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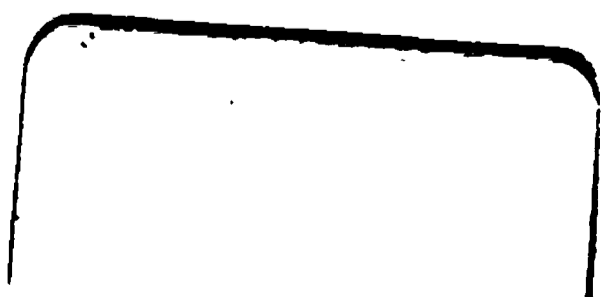
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**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**CIRCUIT COURTS**  
**OF THE**  
**UNITED STATES**  
**FOR THE**  
**FIFTH JUDICIAL CIRCUIT.**

---

**REPORTED BY**  
**WILLIAM B. WOODS,**  
**THE CIRCUIT JUDGE.**

---

**VOL. I.** 

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**JUDGES**  
**OF THE**  
**CIRCUIT COURTS OF THE UNITED STATES**  
**FOR THE**  
**FIFTH JUDICIAL CIRCUIT.**

---

**HON. JOSEPH P. BRADLEY, CIRCUIT JUSTICE,**  
**HON. WILLIAM B. WOODS, CIRCUIT JUDGE.**

**DISTRICT JUDGES:**

**HON. JOHN ERSKINE,**  
**DISTRICTS OF GEORGIA.**

**HON. PHILIP FRASER,**  
**NORTHERN DISTRICT OF FLORIDA.**

**HON. JAMES W. LOCKE,**  
**SOUTHERN DISTRICT OF FLORIDA.**

**HON. JOHN BRUCE,**  
**DISTRICTS OF ALABAMA.**

**HON. ROBERT A. HILL,**  
**DISTRICTS OF MISSISSIPPI.**

**HON. AMOS MORRILL,**  
**EASTERN DISTRICT OF TEXAS.**

**HON. THOMAS H. DUVAL,**  
**WESTERN DISTRICT OF TEXAS.**

**NOTE. — The office of United States District Judge for the District of Louisiana  
is now vacant.**



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**CASES ARGUED AND DETERMINED**  
**IN THE**  
**Circuit Courts of the United States**  
**FOR THE**  
**FIFTH JUDICIAL CIRCUIT.**

---

**DISTRICT OF LOUISIANA.**

---

**AT CHAMBERS, MARCH, 1870.**

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**THORNHILL VS. THE BANK.**

1. An act of the state of Louisiana, entitled "An act to provide for the liquidation of banks," approved March 14, 1842, which provided for the forfeiture of the charter of an insolvent bank, for a stay of all suits against such bank and for the appointment of commissioners to collect the assets and pay the debts of the bank, and distribute any surplus there might be, among the stockholders, is in effect a bankrupt law for banks, and was suspended by the passage by congress of the general bankrupt act.
2. Proceedings under said act in the state court, after the passage of the general bankrupt law, were without authority, and void.
3. The decree of the state court, made by virtue of proceedings under said act declaring the charter of the bank forfeited, constitutes no bar to a proceeding in involuntary bankruptcy against the bank under the general bankrupt law.
4. An adjudication of bankruptcy, made by the bankrupt court, may be reviewed and reversed or affirmed by the circuit court or judge, upon bill or petition filed under the second section of the bankrupt act.
5. Such bill or petition may be heard by the circuit judge in chambers, at any place within the circuit, whether within or without the district where the proceedings in bankruptcy are pending.

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Thornhill vs. The Bank.

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This was a petition addressed to the supervisory jurisdiction of the circuit judge under the second section of the general bankrupt act, to review a decision of the district court for the district of Louisiana. It was heard in chambers at Mobile, in the state of Alabama, on the 31st of January, 1870. The point was made, among others, that the circuit judge was without jurisdiction to hear the cause out of the district of Louisiana.

*Messrs. John A. Campbell and Edward Phillips*, for petitioners in review.

*Messrs. Charles M. Conrad, Thomas Allen Clarke, Thomas Hunton and James B. Eustis*, contra.

WOODS, Circuit Judge. John Thornhill and others filed their petition against the Bank of Louisiana in the U. S. district court for the district of Louisiana, for an adjudication of involuntary bankruptcy against said bank.

After argument and reargument, the court (Hon. E. H. Durell, Judge), on the 11th day of January, 1870, rendered judgment declaring and adjudging the Bank of Louisiana a bankrupt.

To review and reverse this adjudication, this petition of review was filed on January 22d, in the United States circuit court for the fifth judicial circuit and the district of Louisiana by C. E. Willoz, P. H. Morgan and J. F. Irvine, as commissioners of the Bank of Louisiana, appointed under a state law, by the sixth district court of the parish of Orleans, for the purpose of liquidating the affairs of the bank.

The defendants to the petition of review except to the petition on the ground that the petitioners (the commissioners aforesaid) are not the legal representatives of the bank; that the act of the general assembly of Louisiana, under color of which the petitioners claim to represent the bank, and which was approved March 14, 1842, was a bankrupt and insolvent law and was suspended by the act of congress approved March 2, 1867, to establish a uniform system of bankruptcy throughout the United States; that, therefore, the petitioners are without right or authority to interfere in these proceedings, and that

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Thornhill vs. The Bank.

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they have not been aggrieved by the adjudication aforesaid, and their petition of review should be dismissed.

It appears from the agreed statement of facts, that on the 11th day of February, 1868, the board of directors of the bank passed a resolution authorizing the president of the bank to instruct its counsel to institute proceedings under the second section of the act of the general assembly of Louisiana, approved March 14, 1842; for a meeting of the stockholders of the bank to deliberate and determine upon the expediency of surrendering its charter with a view to a liquidation of the affairs of the bank for the common benefit and advantage of its creditors and stockholders, and in conformity with the provisions of law.

By authority of this resolution the counsel of the bank on the 24th of February, 1868, filed in the sixth district court of New Orleans the petition of the president, directors and company, alleging that the bank was in a position which rendered it impossible for it at that time to discharge its liabilities to its creditors and stockholders, reciting the resolution above mentioned, and praying the court to order a meeting of the stockholders for the purpose of deliberating and determining on the expediency of surrendering the charter of the bank.

It having been found impossible to obtain the necessary attendance of the stockholders to make a voluntary surrender of the charter, the attorney general of the state of Louisiana, on May 1, 1868, filed a petition in the same court for the forfeiture of the charter of the bank.

The bank filed no answer to the petition, but the board of directors having been informed by the president that he had been served with an injunction and a citation, and a copy of the petition from the sixth district court in a suit instituted by the attorney general for the forfeiture of the charter of the bank, the board of directors thereupon "*Resolved*, That the cashier be authorized to inform the attorney general that no answer would be made in said cause, and that the court will decide the question raised upon the facts put in proof on the part of the state."

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Thornhill vs. The Bank.

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On the 20th of May, 1868, the sixth district court ordered and decreed that the charter of the bank be declared forfeited, null and void; that all judicial proceedings against the bank be stayed; that a board of commissioners, of whom Charles Eugene Willoz should be one, should be organized for the liquidation of its affairs.

Under this judgment three commissioners were appointed, who immediately assumed the administration of the property and assets of the bank, and proceeded to a liquidation of the affairs of the bank under the laws of the state of Louisiana, until their proceedings were arrested by the filing of the petition of John Thornhill and others in the United States district court of Louisiana, on May 20, 1869, to have the bank adjudged bankrupt.

The act of the general assembly of Louisiana, under which these proceedings were had, is entitled "An act to provide for the liquidation of banks." The first section of the act provides in certain specified cases for the forced forfeiture by judicial proceedings of the charters of any of the banks located in the city of New Orleans, at the instance of the attorney general, on petition filed by him in the name of the state. The second, third, fourth, fifth, and sixth sections provide for a voluntary surrender of charters and dissolution of the corporations by certain proceedings of the stockholders and the decree of the court.

In case either of a forced forfeiture or a voluntary surrender of the charter of a bank, the act requires the court to appoint commissioners who are empowered to take possession of all the property and effects of the bank of every description, with all its books, papers and accounts, to make an inventory of the property and effects, to supervise the destruction of all the notes of the bank found on hand, to collect the assets and pay the debts of the bank, and having done this, to distribute any balance that may remain on hand among the stockholders, ratably, according to the number of shares held by each.

The petitioners in review claim that under the provisions of this act, the charter of the Bank of Louisiana was declared forfeited, null and void by a court of competent and general jurisdiction; that as a consequence of this decree, the bank, when

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proceedings in bankruptcy were commenced against it, was no longer in existence as a corporate body, that it was dead, and no proceedings could therefore be taken against it.

The conflicting views of the petitioners in review and the defendants in review bring up the question whether the act of March 14, 1842, remained in force after the taking effect of the general bankrupt act, on June 1, 1867. If the state law was suspended or repealed by the bankrupt act, the sixth district court had no jurisdiction to proceed under that law, and notwithstanding it may be a court of general jurisdiction, its decree is void. Where there is no jurisdiction of the subject matter, the action of the court is a nullity and may be impeached collaterally. In *Thompson v. Tolmie*, 2 Peters, 163, it was held that "if there is a total want of jurisdiction, the proceedings are void and a mere nullity, and confer no right and afford no justification, and may be rejected when collaterally drawn in question."

In *Voorhees v. Bank of the United States*, 10 Peters, 474, the court held that "a judgment or execution irreversible by a supreme court cannot be declared a nullity by any authority of law, if it has been rendered by a court of competent jurisdiction of the parties, the subject matter, with authority to use the process it has issued. The errors of the court do not impair their validity; binding until reversed, our most solemn proceedings can confer no right which is denied to any judicial act under color of law which can properly be deemed to have been done *coram non judice*; that is, by persons assuming the judicial function in the given case without authority of law."

In determining whether the act of 1842 continued in force after the taking effect of the general bankrupt act, and as a consequence, whether the sixth district court had jurisdiction to proceed under that law, it is pertinent to inquire into the nature, purpose and effect of the act. From an inspection of the law, it is evident that it is intended as a bankrupt or insolvent act. It provides for the voluntary and involuntary bankruptcy of insolvent banks. By virtue of the provisions of the law, the entire property of the corporation is taken from its control and placed in the hands of commissioners appointed by a power

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other than the bank. They, and they alone, are authorized and required to collect its assets, pay its debts, and distribute the surplus, if any, among the stockholders, and by a decree of forfeiture or dissolution, the corporation is discharged from liability after the final settlement of its affairs; for, being dead, it cannot be sued or stand in judgment. Section 24 of the act provides that in all matters not specially provided for in the act, the powers, duties and liabilities of the commissioners shall be the same as those conferred or imposed on syndics of insolvent estates.

Here we have all the elements of a bankrupt law. Insolvency, surrender of property, its administration by assignees or commissioners, distribution among creditors of the assets, and, in effect the discharge of the insolvent corporation.

The act of 1842 has been repeatedly held by the supreme court of Louisiana, to be a bankrupt or insolvent law. In *Citizens Bank of Louisiana v. Levee Steam Cotton Press Co.*, 7 La. An., 288, EUSTIS, C. J., referring to the act of 1842, says: "We do not perceive in this legislation any thing more than an exercise of the power which the government of a state has over bankrupt estates. This power is inherent in all well regulated governments under which commerce is regulated."

In *Mudge and others v. Commissioner of the Exchange and Banking Company*, 10 Rob., La., 464, the court says: "We concur in the opinion expressed by our learned brother of the commercial court that the power of the legislature to provide for the distribution of the property of insolvent corporations which have forfeited their charters, among the creditors is undoubted, and in considering these acts for the liquidation of banks as no other than insolvent laws applicable to such corporations." See also *Dorville v. City Bank*, 9 Rob., 866, and *French v. Stanton et al.*, 1 La. An., 8.

I am therefore forced by the terms of the law itself and by the construction put upon it by the supreme court of Louisiana, to the conclusion that the act of 1842 is a bankrupt or insolvent law. An examination of the act further shows that its provisions apply, as well as those of the general bankrupt act,

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to moneyed corporations, and that it prescribes a different rule for the distribution of the assets of insolvent corporations from that established by the bankrupt law.

Can these two laws, applicable to the same subject matter and prescribing different modes of proceeding and different results, co-exist? If not, which must give way?

The constitution of the United States having empowered the congress to establish uniform laws on the subject of bankruptcies throughout the United States, and the congress having exercised this power in the enactment of the bankrupt law, and the constitution further providing that the laws of the United States which shall be made in pursuance of the constitution, shall be the supreme law of the land, the inference is irresistible that state laws on the subject of bankruptcy and insolvency must yield to the law of congress on the same subject. Where the state law applies to the same subject matter, and where it differs in material respects from the law of congress, it appears clear that the state law is suspended as long as the law of congress remains in force.

Thus in *Griswold v. Pratt*, 9 Metcalf, 23, the court held: "Considering our insolvent law to be a system introduced for the purpose of sequestering the effects of the insolvent debtor and of discharging him from all debts contracted after the enactment of the law, we are satisfied that the two systems cannot stand together; that the provision of the constitution authorizing congress to establish a uniform bankrupt law does not of itself prevent the enactment of insolvent laws by individual states, yet when the power is exercised by congress and a bankrupt law is in force, it does suspend all state insolvent laws applicable to like cases, and that this effect follows the enactment of such bankrupt law, and does not require the actual institution of proceedings in bankruptcy to produce such result."

In *May and others v. Breed and another*, 7 Cushing, 40, the court uses this language: "When a uniform system of bankruptcy under a law of the United States is actually in force, to the extent to which it reaches, it must of necessity suspend state laws, because they would be repugnant."

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In *Clark, assignee, v. Rosenda and another*, 5 Robinson's La., 33, GARLAND, J., in speaking of the effect of the general bankrupt act of 1841, says: "I cannot imagine a more ample investment of jurisdiction than congress has conferred on the circuit and district courts of the United States; and the extent of the jurisdiction proves that the national legislature, whilst exercising its constitutional power to establish a uniform system of bankruptcy, intended to suspend, if not sweep out of existence, the insolvent laws of the states and the jurisdiction of their tribunals, and to establish other tribunals with ample powers where justice should be administered alike to all, and a general system formed and controlled by a body of judges deriving their authority from the same power that made the law."

MARSHALL, C. J., in *Sturges v. Crowninshield*, 4 Wheaton, 195, says: "It does not appear to be a violent construction of the constitution of the United States, and is certainly a convenient one to consider the power of the state as existing over such cases as the law of the Union may not reach." \* \* \* "It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with partial acts of the state."

See also *Commonwealth v. O'Hara*, 6 Int. Rev. Record, 125; *Day v. Bardwell*, 97 Mass., 246; *Van Nostrand v. Barr*, 2 Bankrupt Reg., 154. *Ogden v. Saunders*, 12 Wheaton, 218; *Ex parte Eames*, 3 Story, 522; *Larrabee v. Tulbot*, 5 Gill., 426.

The Bank of Louisiana is, according to the agreed statement of facts, an insolvent moneyed corporation. Such a corporate body falls within the purview of the general bankrupt law of the United States and according to the authorities cited, a state law applicable to a like case is in effect suspended by the law of congress.

I am of opinion, therefore, that on the taking effect of the general bankrupt act on June 1, 1867, the law of the state of Louisiana, approved March 14, 1842, providing for the liquidation of banks, was suspended; that the state courts had no jurisdiction to proceed under it; that the proceedings of the

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sixth district court under the state law against the Bank of Louisiana were unauthorized, *coram non judice*, null and void.

Against this view it is urged that a state alone has power to forfeit the charter of a corporation created by itself; that the general bankrupt law does not provide for the forfeiture of the charter or the dissolution of insolvent corporations; that therefore that part of the state law of 1842, which makes the provision for such forfeiture, is not suspended by the bankrupt law, but left in full force, and the state court under that provision of the law having forfeited the charter of the bank, there is no corporate person *in esse*, for the bankrupt law to operate on.

This argument may be fairly reduced to this proposition; that although the national courts have exclusive jurisdiction in bankruptcy of insolvent moneyed corporations, yet under the device and pretext of forfeiting the charters of the banks, the state courts may oust the jurisdiction of the federal court, assume jurisdiction themselves and give to a state law the effect of suspending or repealing *pro hac vice* an act of congress expressly authorized by the constitution. This cannot be allowed. No mode of proceeding authorized by a state law can be permitted to have this effect. If the forfeiture under the state law of the charter of the bank raises an obstacle to the jurisdiction of the federal courts, then the clause authorizing the forfeiture of the charter is itself suspended by the federal law. To hold otherwise is to allow the states, by a particular form of legislation, to override a law of congress on a subject over which congress by the constitution has supreme power.

Under the state law of 1842, the courts are not authorized to forfeit the charters of the insolvent banks and there stop. They are required to proceed by the appointment of commissioners to the liquidation of the affairs of the bank; in effect to administer a bankrupt law of the state. Is it possible that by so short and simple a method the state courts can wrest from the federal courts a jurisdiction conferred exclusively on them?

I do not undertake to decide what effect the decree of the sixth district court forfeiting the charter of the bank may have

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as between the state and the bank, but I hold that the state court had no power or jurisdiction to render a decree which could take from the federal courts a power and jurisdiction given them by act of congress; that for all the purposes of the bankrupt act, and the liquidation of its affairs thereunder, the bank of Louisiana still exists as a corporate body and may be proceeded against as such in bankruptcy.

A corporation may still exist for the purpose of liquidation although its charter may have been surrendered or forfeited. In *Commercial Bank v. W. M. Villavoso*, 6 La. An., 542, it was held that the fact that the Commercial Bank had gone into liquidation under the act of March 14, 1842, was no reason why the commissioners appointed to liquidate its affairs should not use the corporate name of the bank in collecting its assets by judicial proceedings.

It results from these views that the sixth district court had no power to appoint commissioners in liquidation for the Bank of Louisiana; that the attempt to appoint such commissioners is a void act; that the commissioners named by the court do not represent the bank; that they are without right or authority to interfere in their proceedings; that they are not aggrieved by the adjudication of the district court of the United States for the district of Louisiana, and that for these reasons, if no other, their petition for review must be dismissed.

Without further prolonging this opinion, I hold upon the other questions raised in the case:

1. That the circuit judge has territorial jurisdiction to hear and determine this petition of review in chambers at any place within the fifth judicial circuit.

2. That the adjudication in bankruptcy made by the U. S. district court may be reviewed by petition of review addressed to the circuit court or any justice thereof.

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**The Bank vs. Labitut.**

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**APRIL TERM, 1870.**

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**THE BANK VS. LABITUT.**

1. Where the marshal had levied an execution on a crop of sugar and molasses, the intervention and third opposition of parties claiming a superior lien and privilege on the property, asking that the marshal be required to retain sufficient of the proceeds to pay the claim of the interveners and for judgment against the judgment debtor for the amount of said claim, is a proceeding upon the law side of the court, and the interveners are not compelled to resort to a bill in equity for relief.
2. The judgment or order of a court finally disposing of a case, cannot be reviewed at a subsequent term on motion. The only relief for errors in law in such cases is by review, writ of error or appeal, as either may be appropriate.

This cause came up at the April term, 1870, on motion to reinstate interventions and third oppositions which had been dismissed at a previous term.

*Mr. J. Ad. Rosier*, for the motion.

*Mr. Edward Phillips*, contra.

WOODS, Circuit Judge. Alex. E. Prewett and the Northern Bank of Kentucky each recovered judgment in this court on the law side against Jules Labitut, the defendant, on which executions were issued and levied on defendant's crop of sugar and molasses, made by him on his plantation in the year 1869.

Before the sale under the execution, Octave Hopkins filed his intervention and third opposition in his own behalf, and an intervention and third opposition in behalf of a large number of other persons, of whom he alleges himself to be the agent and attorney in fact. In this intervention he claims that he and the persons whom he represents have a lien and privilege on said crop of sugar and molasses, superior to that of any other creditor of Jules Labitut, and prays that the marshal be directed to retain in his hands the proceeds of the sale of

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the crop, until the interventions and third oppositions can be heard, and that judgment against Labitut may be rendered in favor of interveners, and the marshal directed to pay first, out of the funds in his hands from the sale of said crop, the judgment in favor of interveners. •

On the 8th of March, 1870, during the last term of this court, these interventions and third oppositions were dismissed, without prejudice to the right of the parties to file a bill in chancery.

On the 26th of April, during the present term of the court, a rule was taken on the plaintiffs in execution to show cause why the interventions and third oppositions dismissed on March 8th should not be reinstated and the order of dismissal rescinded.

This is the rule now before the court for decision.

We think the interventions and third oppositions were improperly dismissed. That courts of common law as well as courts of equity and of admiralty possess a controlling power over money brought into these courts respectively by their process, is undeniable. It is every day's practice in the common law courts, upon rules to show cause or upon motion to examine and decide the claims of third persons to money made under execution and paid into court. These interventions and third oppositions, in a more formal and precise way, invoke a power of the law side of the court which in common law states is exercised upon motion or rule. They constitute a convenient and summary method of disposing of the rights of persons to property levied on under execution. And though the forms may differ in different states, the proceedings have always been considered to be on the law side of the court. In some states when property is levied on which is claimed by another, a summary proceeding is instituted by the claimant, called "trial of the right of property." After the property is sold and the money is in the hands of the officer of the court, it is reached by motion, and the rights of the contestants to the fund tried and adjusted by the court. A bill in equity may be filed in a case of equitable jurisdiction.

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We regard these interventions and third oppositions as proceedings on the common law side of the court. The act of May 19, 1828, provides that the forms and modes of proceedings in suits in the courts of the United States held in those states admitted into the Union since the 29th day of September, in the year 1789, in those of common law, shall be the same in each of said states respectively, as are now used in the highest court of original and general jurisdiction of the same. This is the law of this court to day. Interventions and third oppositions were in use in this state, on and long prior to May 19, 1828, and we think they are authorized by the statute just quoted. These interventions were therefore improperly dismissed.

But we are clearly of the opinion that the motion to reinstate them, and to rescind the order dismissing them comes too late. They were dismissed March 8, during the term which commenced on the first Monday of November, 1869, and this motion is made during the term which commenced on the fourth Monday of April, 1870.

Nothing is better settled than this, that after a court has adjourned, it cannot set aside one of its own judgments; the judgment is binding until reversed on error. See *Bank of United States v. Moss*, 6 Howard, 31, where this whole subject is discussed and authorities collated. A mere error in law of any kind, supposed to have been committed in a judgment of a court at a previous term, is never sufficient justification for revising or annulling it at a subsequent term in this summary way on motion. A court has power at a subsequent term to set right mere forms in its judgments, to correct misprisions of its clerks, and to correct any mere clerical errors so as to conform the record to the truth; irregularities also in notices, mandates and similar proceedings, can in some cases be amended at a subsequent term, and in short, all amendments permissible under the statute of *jeofails* may be made at a subsequent term. But the only relief for errors in law in such cases is by review, writ of error or appeal, as either may be appropriate.

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The United States vs. \$5,100 in Specie.

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The cases in which these interventions were filed, were completely disposed of at the last term of this court. The interventions were dismissed. That is the end of the matter. The cases cannot be heard again at a subsequent term by having them again placed on the docket. They have become *res adjudicata*, and can only be reached in one of the methods already indicated.

Because this motion comes too late, it must be dismissed.

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THE UNITED STATES VS. \$5,100 IN SPECIE.

An appeal in a case of admiralty and maritime jurisdiction not taken to the next term of the circuit court after the rendition of the decree in the district court will be dismissed.

The specie in this case was seized upon water and within the admiralty and maritime jurisdiction of the district court. The court below having decreed in favor of claimant, the United States appealed to this court. Thereupon a motion was made by claimant to dismiss the appeal.

*Messrs. Jos. P. Horner and W. S. Benedict*, for the motion.

*Mr. Alanson B. Long*, U. S. Attorney, *contra*.

WOODS, Circuit Judge. In this case, a motion to dismiss the appeal is made upon the ground that the appeal was not taken to the next circuit court of the United States, held within the district after the rendition of the decree. The record shows that the decree in favor of the defendant was signed on January 30, 1864. The law and records of this court show that the next circuit court for the district was held on the 25th of April, 1864.

An appeal was prayed and allowed on May 13, 1864, returnable on the first Monday of November, 1864, and the record was filed in this court on October 12, 1864.

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**Morgan vs. The Railroad Company and others.**

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The law says that appeals are allowed from final decrees in the district court, in cases of admiralty and maritime jurisdiction to the next circuit court to be held in the district (1 Stat., 83). This appeal was not taken to the next circuit court after the rendition of the decree, but one entire term of the circuit court was allowed to pass over, and the appeal was taken to the next following term.

The causes referred to in the brief of appellee show that it is the practice of the circuit courts to dismiss appeals when not taken to the next circuit court. This practice is founded upon the statute, and seems to be in conformity with the policy of the law in cases of admiralty and maritime jurisdiction. That policy requires speedy administration of justice, and discourages delay. The statute says the appeal may be taken to the next circuit court, it authorizes an appeal to no other term. If we were authorized to depart from the wise rule laid down by the act of congress, there would be no limit to the delay which would follow in this class of cases.

Because, therefore, the appeal was not taken to the next term of the circuit court held in the district after the rendition of the decree, the appeal must be dismissed.

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**MORGAN VS. THE RAILROAD COMPANY and others.**

1. Unless a party has a right to sue in the local courts, he cannot sue in the federal courts. The latter cannot create a right to sue, and can only take jurisdiction when the right exists by law, and the plaintiff and defendant are citizens of different states.
2. A stockholder in a business corporation cannot sue in equity for relief against an injury done or threatened to the corporation in which he is a stockholder without an averment that the corporation or its officers are derelict in their duty.
3. The appropriate party to sue for such injury is the corporation itself, acting by its legal officers and managers.
4. The ownership of stock does not give the stockholder any legal estate in the property of the corporation.

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Morgan vs. The Railroad Company and others.

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This was a bill in equity, which was heard upon the motion of complainant for a preliminary injunction.

*Mr. Miles Taylor*, for complainant.

*Mr. John A. Campbell*, for defendants.

BRADLEY, Circuit Justice. The plaintiff in this case has filed a bill for an injunction against the New Orleans, Mobile and Chattanooga Railroad Company, to prevent its doing a threatened injury to the Pontchartrain Railroad Company, of which the complainant is a stockholder; which threatened injury, the complainant alleges, will greatly diminish the value of his stock. It is not pretended that the Pontchartrain Railroad Company, or its officers or directors, are not competent and willing to vindicate its rights; or that they are guilty of any complicity with the defendants, or even of any neglect to perform their proper duties, for the protection of the interests of their stockholders. The only apparent reason for the suit being brought in the name of the complainant is that he is a citizen of New York, and can maintain a suit against the defendants in the federal court; whereas the Pontchartrain Railroad Company, being a corporation of Louisiana, would be obliged to sue in the state court. This reason is not sufficient to give the complainant a right to maintain a suit. Unless he has a right to maintain a suit in the local courts, he cannot maintain one in the federal court. The latter court cannot create a right to sue; it can only take jurisdiction of such a right when it already exists by the state law, and when the complainant, at the same time, is a citizen of another state.

The demurrer in this case, therefore, raises the question, whether a stockholder of a business corporation can sue in equity for relief against an injury done, or threatened to be done, to the corporation of which he is a stockholder, without any averment that the corporation or its officers are derelict in their duty.

If such a suit has ever been maintained, it must have been at a period when corporations were much fewer, and when their powers and capacities were much less understood than they are

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**Morgan vs. The Railroad Company and others.**

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at the present day; or because the objection was not taken to the proceeding.

The power to use a corporate name and seal, and to sue and to be sued by such name, is one of the essential and primary features of a corporation. Persons who are constituted a body politic or corporate lose, in respect of that association, their individual character and personality. A new and artificial person is created — totally distinct from the individuals who compose it. Its functions are not their functions; its property is not their property; its rights and liabilities are not theirs. Its officers and directors are not even trustees or agents of the stockholders, but trustees and agents of the corporation. The legal and equitable rights of the stockholders are, to vote at the stockholders' meetings, to participate in the profits, and to have the funds and property of the corporation devoted to their original use, and not diverted therefrom or otherwise wasted by the fraudulent act or willful neglect of the directors. For the vindication of these rights appropriate remedies exist, which act directly upon or against the corporation itself or the corporate officers who are charged with delinquency. And by and through the equity which the stockholder has against delinquent officers, he may often obtain relief against strangers combining with them. But in no other way can a stockholder prosecute a stranger for injuries done or threatened to the corporate property or franchises.

The appropriate party to sue for such injuries is the corporation itself, acting by its legal officers and managers. It is their duty to take care of the corporate interests. They are the only persons legally invested with the power to do it. The members of the corporation are clothed with a power to sue by the corporate name, and public policy requires that they should do so. The objects of the incorporation of the society would be largely defeated by allowing every member, at his discretion, to sue for real or supposed injuries to the corporate body. It would subject other parties to embarrassment. It would lead to an inconvenient multiplication of suits.

But, it is said that a stockholder has a direct legal interest

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**Morgan vs. The Railroad Company and others.**

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in his stock, which may be affected by an injury to the corporation; and reference is made to the well known fact, that immense investments of capital are made in corporation stocks, which constitute a large portion of the funded property of the country; and that these stocks are really nothing but certificates or title deeds showing the proportionate interest of the holder in the property of the corporation itself. This is a specious statement of the case. But the conclusion aimed at is not true. The possession of capital stock does not give a person a particle of legal interest in the corporation property. Though he possess one-half the entire stock, he is not, therefore, one-half owner of the corporate property. The corporation still owns it all. There is no divided ownership in the case. Possession of the stock merely entitles the holder thereof to the incidental rights above enumerated — a right of vote, a right of dividend, a right of faithful appropriation of the funds. These rights are very different from the right of property. It is these rights which give value to the stock as a marketable commodity.

An injury to the corporate franchises or property will undoubtedly affect the market value of the stock; but that injury is so remote, indirect and consequential, that it can lay no foundation for an action or suit against the aggressor. The stockholder must rely on the corporation, which alone is directly affected by the injury, to obtain through its proper officers, the adequate redress. Should these officers refuse to perform their duty, then only can the stockholder appeal to the courts for aid against them, and through them for aid against the wrong doer. These principles are assumed as law in the cases of *Dodge v. Woolsey*, 18 Howard, 341; *Bronson v. La Crosse Railroad Co.*, 2 Wallace, 302; and *Memphis City v. Dean*, 8 Wallace, 73. In the last case, the court say: "The judgment of the court in the case of *Dodge v. Woolsey* authorizes the stockholder of a company to institute a suit in equity in his own name against a wrong doer, whose acts operate to the prejudice of the interests of the stockholders, such as diminishing their dividends and lessening the value of their

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**The United States vs. '87 Barrels of Rum.**

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stock, in a case where application has first been made to the directors of the company to institute the suit in its own name, and they have refused. This refusal of the board of directors is essential in order to give to the stockholder any standing in court, as the charter confers upon the directors representing the body of stockholders, the general management of the business of the company. There must be a clear default, therefore, on their part, involving a breach of duty, within the rule established in equity, to authorize a stockholder to institute the suit in his own behalf, or for himself and other stockholders who may choose to join." A large number of cases to the same purport will be found collected in Abbott's Digest on the Law of Corporations, title, Stockholders. See also, Grant on Corporations, 290-292; Angell & Ames on Corporations, sec. 391, (6th Ed.)

This is decisive against the right of the complainant in the present case to maintain his suit. So far from showing any complicity of the directors of the Pontchartrain Railroad Company with the defendants, or even any neglect or default on their part, in protecting the interests of the corporation, the bill exhibits the record of a suit brought by the company in the state court for precisely the same relief which is sought here.

Under these circumstances, I have no hesitation in coming to the conclusion that the motion for injunction must be denied, and the bill dismissed.

Let a decree be entered accordingly.

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**THE UNITED STATES V. '87 BARRELS OF RUM.**

1. When property is seized upon land and libelled as forfeited to the United States for violation of the revenue laws, the case belongs to the common law side of the court, and can only be reviewed by writ of error.
2. When such a case is appealed, the appeal will be dismissed.

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The United States vs. 87 Barrels of Rum.

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This case was a seizure of property upon land for violation of the revenue laws. It was brought from the district court into this court by appeal, and was heard at the April term, 1870, on motion to dismiss the appeal.

*Mr. A. B. Long*, U. S. Attorney, for the United States.

*Mr. J. R. Beckwith*, for claimant.

WOODS, Circuit Judge. In this case a motion is made to dismiss the appeal on the single ground that the judgment appealed from was rendered on the common law side of the district court, and that it cannot be brought up for revision by appeal.

The act of congress regulating errors and appeals from the district to the circuit court, provides :

1. That from final decrees in a district court in causes of admiralty and maritime jurisdiction, when the matter in dispute exceeds \$300, exclusive of costs, an appeal shall be allowed to the next circuit court to be held in such district, and

2. That final decrees and judgments in civil actions in a district court when the matter in dispute exceeds the value of fifty dollars, exclusive of costs, may be reexamined, reversed and affirmed in a circuit court holden in the same district by a writ of error.

These are the provisions of the judicial act, (secs. 21 and 22, 1 Stat., 83, 84), and they remain the law to-day, except in this particular, that by the act of March 3, 1803, an appeal is allowed when the matter in dispute exceeds the sum of value of \$50, exclusive of costs.

By the terms of the law and by the construction put thereon by the decisions of the courts, appeals from the district to the circuit court are limited to cases of admiralty and maritime jurisdiction; all other cases are reviewed by writ of error. *U. S. v. Haynes*, 2 McLean, 155; *U. S. v. Wonson*, 1 Gallison, 5.

An appeal is not allowed by the common law, nor is it a matter of right. When a party has had his cause adjudicated by a court of competent jurisdiction, that adjudication is final unless the statute gives an appeal, and where the statute fails to do this, the right of appeal does not exist. This case was a

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**The Slaughter House Case.**

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seizure made upon land. This fact is conclusive of the character of the action. Whatever it may be, it is not a case of admiralty or maritime jurisdiction, and no matter what form the proceedings take, the nature of the action is not changed.

This case is a civil cause in the nature of a *qui tam* action, and is prosecuted on the law side of the court, and by the terms of the statute it must be brought up by writ of error and not by appeal.

For the reason therefore stated in the motion to dismiss the appeal, the motion is sustained, and the appeal dismissed.

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**THE SLAUGHTER HOUSE CASE.**

(Before BRADLEY and WOODS, J. J.)

1. The first section to the fourteenth amendment of the constitution, applies as well to white as colored persons, as citizens of the United States; and is intended to protect them in their privileges and immunities, as such citizens, against the action, as well of their own state, as of other states in which they may happen to be.
2. These privileges and immunities do not consist merely in being placed on an equality with others; but embrace all the fundamental rights of citizenship.
3. One of these fundamental rights is that of pursuing any lawful employment in a lawful manner; or, in other words, the right to choose one's own pursuit, subject only to constitutional regulations and restrictions.
4. Police regulations made for the preservation of the public health, order and morality, and not expressly prohibited by the constitution, are among the reserved powers of the states, and are not an interference with the rights of citizenship.
5. But an exclusive privilege, granted to a few individuals, and their successors, incorporated into a society, to have and keep cattle landings, stock yards and slaughter houses in the city and neighborhood of New Orleans, with a prohibition to all others from having or keeping any such establishments therein, is a restriction which violates the fundamental rights of other citizens willing to conform to all police regulations adopted for the public comfort and safety.
6. A legislative act granting such an exclusive privilege is a violation of the fourteenth amendment, and void.

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7. Such a law cannot be sustained under the power to pass police regulations and license laws, or the power to grant exclusive rights for the exercise of public franchises.
8. Public franchises, such as the establishment of highways, turnpikes, railroads, ferries, markets, etc., are not common rights, but are public privileges, granted by the legislature upon such terms as it sees fit.
9. But the law above described allows certain privileged persons to pursue an ordinary employment, and prohibits others from doing so, and thus goes to establish one of those monopolies which are contrary to the spirit of a free government.
10. If, however, the state courts sustain such a law, and attempt to enforce it, the circuit court of the United States cannot issue an injunction to stay proceedings, being prohibited by the act of 1793, and congress having passed no law to carry the fourteenth amendment into effect, the remedy is to carry the suit to the highest state court, and then, by writ of error, to the supreme court of the United States.
11. By the civil rights bill, however, which, as far as it goes, covers the same ground as the fourteenth amendment, the circuit court may take cognizance of this case, and grant an injunction, except for staying proceedings already commenced in a state court.

[NOTE. — The act of April 20, 1871, for enforcing the XIVth amendment, gives the circuit court and district courts ample jurisdiction on the subject.]

**MOTION for Injunction on Bill and Answer.**

This case was argued by *Mr. J. A. Campbell*, for complainants, and *Messrs. W. H. Hunt* and *C. Roselius*, for defendants.

The same questions have since been argued in the supreme court of the United States, in "*The Slaughter House Case*" (16 Wall., 36), upon writs of error to the supreme court of Louisiana in the cases referred to in the statement below, and a different result was arrived at by a majority of the court from that reached by Judges BRADLEY and WOODS in this case. But the importance of the questions, the want of unanimity in the supreme court, and the fact that this was the first case in which the subject was fully considered, seem a sufficient apology for reporting the case here, notwithstanding it has appeared in several other publications, and has been reported in 1 Abbott's U. S. Rep., 388.

The case, briefly stated, was as follows:

The complainants, who were engaged in the live stock landing and slaughter-house business, filed a bill against the de-

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fendants, in which they prayed for an injunction to cause them to suspend all proceedings against the complainants under and by virtue of an act of the legislature of Louisiana, passed 8th of March, 1869, giving to the corporation defendants, the exclusive right to erect and have live stock landings and slaughter houses in and about New Orleans, which act the complainants alleged to be in violation of the civil rights bill, passed 9th of April, 1866, and the first section of the fourteenth amendment of the constitution of the United States; also, that the complainants be protected in their rights to perform whatever may be lawful and proper in this behalf for any citizen of the state to do (including the defendants), and in their right to slaughter, land, keep, maintain and sell animals for food, and, when prepared for market, to sell and dispose of their meat, subject to no condition more severe than that of any other party (including the defendants), and that they be maintained in their rights to construct all suitable buildings, structures for landing, keeping and preserving animals for sale or use that are allowed to any other citizen of the state, including the defendants.

The following were the leading facts of the case as presented to the court: The legislature of Louisiana, in March 1869, passed an act, entitled "An act to protect the health of the city of New Orleans, to locate stock landings and slaughter houses, and to incorporate the Crescent City Live Stock Landing and Slaughter House Company."

This law, after prohibiting any live stock landings, cattle yards, or slaughter houses within New Orleans, or the adjacent parishes, except below certain points on each side of the Mississippi river, proceeded to constitute certain persons, seventeen in number, and their successors, a corporation called the Crescent City Live Stock Landing and Slaughter House Company, and to give said company the sole and exclusive right to have, keep, and erect, live stock landings, cattle yards and pens, and slaughter houses within the districts where such establishments are allowed by the act, and the exclusive right to conduct and carry on the live stock landing and slaughter house business; and the exclusive right to have all cattle and other

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animals landed, kept and slaughtered therein, which were intended for the New Orleans market or for sale elsewhere in the parishes of Orleans or Jefferson ; and directed the closing up and discontinuance of all other yards, slaughter houses and stock landings. For the privilege of slaughtering cattle in the company's slaughter house, parties were required to pay \$1 for every beef, besides a toll of the head, feet, gore and entrails ; and in the same proportion for other animals. The company were to erect sufficient buildings and landings for the accommodation of the business by the 1st of June 1869, or forfeit their charter. All animals slaughtered were to be subject to inspection by an inspector to be appointed by the governor ; and the charter was to continue 25 years.

The company having become organized, and having erected or purchased buildings and landings, undertook to carry the law into effect by suing for penalties and for injunctions out of the state courts to prohibit other parties from carrying on their business, though carried on, as to locality, and other regulations in all respects in compliance with the law. Several hundred suits were brought, and some cross suits ; but the result of this litigation was that the supreme court of Louisiana sustained the monopoly. The contestants then brought writs of error to the supreme court of the United States, which were allowed by Mr. Justice BRADLEY ; but no attention was paid by the state courts to the supersedeas effected by these writs. Finally, the contestants filed the bill in equity in this case, and applied for an injunction to stay the proceedings of the monopoly company and to prevent them from adopting or initiating any further actions to harass and annoy the complainants. This was the application made to Justice Bradley and Judge Woods, who were then holding the circuit court.

BRADLEY, Circuit Justice. This application brings up the question whether the civil rights bill applies to such a case as the present, and whether the fourteenth amendment to the constitution is intended to secure to the citizens of the United States of all classes merely equal rights ; or whether it is in-

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tended to secure to them also absolute rights? And if the latter, whether the rights claimed by the complainants in this bill are among the number of such absolute rights?

[After intimating an opinion, subsequently modified, that the civil rights bill did not apply to the case, the judge proceeded to recite the provisions of the law complained of, noting the broad distinction between the first section which is a proper police regulation, and the remaining sections, which establish the monopoly privileges. He then proceeded as follows:]

These are the provisions of the law. The complainants allege that they have been injured by its operation, and by the acts and proceedings of the defendants under it.

They state in their bill that for a long time past they have been engaged in the lawful prosecution of the live stock landing and slaughter-house business, and in procuring, preparing, dressing and vending of animal food for the markets of New Orleans and the parishes of Jefferson and St. Bernard, and the steamers and other vessels engaged in the commerce of the same; and that more than a thousand persons were connected with the trade aforesaid, and that the corporation complainant was formed to prosecute the trade and to provide suitable houses and conveniences therefor, and that the said corporation and its members, to the number of two hundred and fifty persons, and others in their employ, to the number of two hundred persons, have been hitherto engaged in the same trade and business.

They complain that their rights are invaded by the act in question; that the Crescent City Company have brought several hundred suits against them, or some of them; have obtained injunctions, and in other ways vexed and harassed the complainants under cover of the said acts; that the decisions and judgments of the state supreme court have been adverse to the complainants; and that although the said decisions and judgments have been removed to the supreme court of the United States by writs of error, in such manner that said writs operated as a supersedeas, yet that the defendants have disregarded the same, and have applied to the eighth district court of

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the parish of Orleans, and have obtained a writ which they call an injunction, directed to the metropolitan police board, without making the complainants or any of them parties to the proceeding, by which writ said metropolitan police board were commanded and enjoined to prevent all persons from landing, keeping or slaughtering any cattle, beeves, calves, sheep, swine or other animals, and from keeping or establishing any stock landings, yards, pens, slaughter houses or abattoirs, at any point or place within the city of New Orleans, or the parishes of Orleans, Jefferson and St. Bernard, and to prevent any and all persons from selling or offering for sale in the city of New Orleans any animal for human food not slaughtered and inspected at the slaughterhouse of said company; and that the said metropolitan police board did thereupon seize and possess themselves of meat to the value of \$20,000, which was in carts and vehicles on their way to the markets, and have kept the same open and exposed until it has spoiled. The bill contains other allegations showing that the complainants are exposed to a multiplicity of suits, to vexatious litigation, and to irreparable mischief and damage by the unjust acts and proceedings of the defendants, the Crescent City Company.

To this bill the defendants have filed an answer in the nature of a demurrer, objecting, first, to the jurisdiction of this court because the parties all reside in Louisiana, and the circuit court of the United States cannot enjoin proceedings in a state court; secondly, that the bills set up the same matters which are set forth in a petition filed by the complainants in the state court, and decided by the supreme court of Louisiana, and from which decision a writ of error has been granted to remove the same to the supreme court of the United States; thirdly, because the statute referred to is constitutional and valid, containing only police regulations, in no manner conflicting with the constitution of the United States, or the amendments thereof.

Before proceeding to examine the technical points raised by the defendants, we will discuss the main question arising upon the act of the legislature and the fourteenth amendment.

The constitution of the United States before the adoption of

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the recent amendments, contained several provisions for the protection of the people in the enjoyment of their civil rights, liberties and privileges, some of which were binding upon the government of the United States, and others upon the several states. Of the former kind were those which declared that the privilege of the writ of *habeas corpus* should not be suspended, unless when in cases of rebellion and invasion, the public safety should require it; that no bill of attainder or *ex post facto* law should be passed; that no capitation or other direct tax should be laid, unless in proportion to the census; that the trial of all crimes should be by jury, and should be held in the state where committed; that no person should be convicted of treason unless on the testimony of two witnesses to the same overt act or confession in open court; that no attainder of treason should work corruption of blood or forfeiture, except during the life of the person attainted, etc.

Those binding on the states were, that no state should make anything but gold and silver coin a tender for payment of debts; nor pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts; or lay any imposts or duties on imports or exports, except as provided in the constitution; and that the citizens of each state should be entitled to all privileges and immunities of citizens in the several states.

The latter class of provisions could not be carried into effect by congressional legislation, and depended for their vindication upon the voluntary action of the state legislature and such jurisdiction as the courts of the United States might have when a case arose in which one of these rights was violated.

Since the breaking out of the late war, several amendments to the constitution have been adopted, intended to protect the citizens from oppression by means of state legislation, and to confer upon congress the power, by appropriate legislation, to carry the amendments into effect. Among these amendments, the fourteenth declares that "all persons born or naturalized in the United States, and subject to its jurisdiction, are citizens of the United States and of the state wherein they reside, and that no state shall make or enforce any law which shall abridge

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the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The new prohibition that "no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States," is not identical with the clause in the constitution which declared that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." It embraces much more.

It is possible that those who framed the article were not themselves aware of the far reaching character of its terms. They may have had in mind but one particular phase of social and political wrong which they desired to redress. Yet, if the amendment as framed and expressed, does in fact bear a broader meaning, and does extend its protecting shield over those who were never thought of when it was conceived and put in form, and does reach social evils which were never before prohibited by constitutional enactment, it is to be presumed that the American people, in giving it their *imprimatur*, understood what they were doing, and meant to decree what has in fact been decreed.

The "privileges and immunities" secured by the original constitution were only such as each state gave to its own citizens. Each was prohibited from discriminating in favor of its own citizens and against the citizens of other states.

But the fourteenth amendment prohibits any state *from abridging the privileges or immunities of the citizens of the United States*, whether its own citizens or any others. It not merely requires equality of privileges but it demands that the privileges and immunities of all citizens shall be absolutely unbridged, unimpaired.

What then, are the essential privileges which belong to a citizen of the United States as such, and which a state cannot by its laws invade? It may be difficult to enumerate or define them. The supreme court, on one occasion, thought it unwise to do so (*Conner v. Elliott*, 18 Howard, 591). But so far as relates to the

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question in hand, we may safely say that it is one of the privileges of every American citizen to adopt and follow such lawful industrial pursuit — not injurious to the community — as he may see fit, without unreasonable regulation or molestation, and without being restricted by any of those unjust, oppressive and odious monopolies, or exclusive privileges which have been condemned by all free governments; it is also his privilege to be protected in the possession and enjoyment of his property, so long as such possession and enjoyment are not injurious to the community; and not to be deprived thereof without due process of law; it is also his privilege to have, with all other citizens, the equal protection of the laws. Indeed, the latter privileges are specified by the words of the amendment.

These privileges cannot be invaded without sapping the very foundations of republican government. A republican government is not merely a government of the people, but it is a free government. Without being free, it is republican only in name, and not republican in truth, and any government which deprives its citizens of the right to engage in any lawful pursuit, subject only to reasonable restrictions, or at least subject only to such restrictions as are reasonably within the power of government to impose, is tyrannical and unrepugnant. And if to enforce arbitrary restrictions made for the benefit of a favored few, it takes away and destroys the citizens' property without trial or condemnation, it is guilty of violating all the fundamental privileges to which I have referred, and one of the fundamental principles of free government.

There is no more sacred right of citizenship than the right to pursue, unmolested, a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor.

This right is not inconsistent with any of those wholesome regulations which have been found to be beneficial and necessary in every state.

It is not inconsistent with the exclusive right to make, use and vend to others for a limited period, a new and useful invention, which the grantee or patentee has produced from his own brain or ingenuity. Society only gives to him the temporary

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use of that which, without him, it would not have had the benefit of, as a consideration of that benefit, and to encourage others to make like use of their powers.

It is not inconsistent with the exclusive right to use a franchise; that is, a right to do what the legislature alone can authorize to be done, and which no private citizen has a right to do without such authority, such as to build and operate a railroad, to make a canal or turnpike, to establish a ferry, and other such public rights which involve a charge upon the public, and in most cases an exercise of the right of eminent domain. These franchises may be conferred upon a limited number of persons, natural or corporate, with power, and even exclusive power, to exercise them in certain localities, on certain terms, and under certain restrictions. Society obtains a consideration for the grant of these franchises in the investment of large amounts of capital in public improvements, which are required for the development of the country and its resources. They are franchises which can only be exercised as they are conferred by public authority, and can not be exercised and enjoyed by all. They are far different from those ordinary pursuits and employments of mankind which all citizens may properly and lawfully follow as their inclination leads them, and as the laws of demand and supply will allow.

Again: This fundamental right of labor is not inconsistent with that large class of cases, in which the laws require a license or a certificate of requisite qualifications for admission to a particular employment or profession. No doubt there are many such, as to which the interests of society require that due preparation should be made and due qualifications should be possessed, before a person shall be allowed to enter them. But then they are open to all alike. None are excluded from the race of honorable competition, by which to enter those employments, or by which to attain their honors. There is no corporate and exclusive guild of privileged individuals to which they are confined, and beyond the sacred pale of which there is no hope of admittance or promotion.

Nor is it inconsistent with the granting of a limited number

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of municipal licenses to follow certain pursuits, such as vending of intoxicating drinks, selling of drugs, or even selling of meats, and keeping a market therefor. Public policy may require that these pursuits should be regulated and supervised by the local authorities, in order to promote the public health, the public order, and the general well-being. But they are open to all proper applicants, and none are rejected except those who fail to exhibit the requisite qualifications and guarantees, or who, after proper selections are made, would increase the number beyond what the interests and good order of society would bear. In those cases none are excluded for the purpose of sustaining a monopoly. But each avocation is, or at least is supposed to be, examined on its own merits.

All these systems of regulation are useful, and entirely competent to the governing power, and are not at all inconsistent with the great right of *liberty of pursuit*, which is one of the fundamental principles of a free government, as well as one of the fundamental privileges of an American citizen.

The next question is, Do the law complained of, and the proceedings under it, conflict with the enjoyment of this fundamental privilege of the complainants? Or is it only such a political and police regulation as it is competent for a state legislature to make?

The legislature has an undoubted right to make all police regulations which they may deem necessary (not inconsistent with constitutional restrictions) for the preservation of the public health, good order, morals and intelligence; but they cannot under pretense of a police regulation interfere with the fundamental privileges and immunities of American citizens. The question has its limits in both directions, and whilst we are to be specially careful not to do anything that may trench upon the vast and almost limitless field of legislation, where the will of the people is supposed to be most freely and powerfully expressed, it is nevertheless our duty, with a firm and unflinching hand, to prevent the invasion of any clear and undoubted individual rights of the citizen which are secured to him by the constitution.

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So far as the act of legislature of Louisiana is a police regulation, it is, of course, entirely within its power to enact it. It is claimed to be nothing more. But this pretense is too bald for a moment's consideration. It certainly does confer on the defendant corporation a monopoly of a very odious character. It it be not fairly and fully within the definition of a monopoly given in the great case of monopolies, 11 Coke, 85, it is difficult to conceive of a case which would be within it. But it is not sufficient to show that it is a monopoly and void at common law, for the legislature may alter the common law and may establish a monopoly, unless that monopoly be one which contravenes the fundamental rights of the citizen protected by the constitution. We have already seen that some monopolies are legal, if not politic. But is this such an one as will be endured in a free country, under a constitution which guaranties to the citizen his fundamental privileges and immunities? This is the precise question for us to decide. And we admit that the question is one of great delicacy and embarrassment. When the question was first presented, our impressions were decidedly against the claim put forward by the plaintiffs. But the more we have reflected on the subject, the more we are satisfied that the fourteenth amendment of the constitution was intended to protect the citizens of the United States in some fundamental privileges and immunities of an absolute and not merely of a relative character. And it seems to us that it would be difficult to conceive of a more flagrant case of violation of the fundamental rights of labor than the one before us.

It was very ably contended, on the part of the defendants, that the fourteenth amendment was intended only to secure to all citizens equal capacities before the law. That was at first our view of it. But it does not so read. The language is: "No state shall abridge the privileges or immunities of citizens of the United States." What are the privileges and immunities of citizens of the United States? Are they capacities merely? Are they not also rights?

In the case before us, the citizen has chosen a lawful and

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useful employment. He has been brought up to it and educated in it. He has invested property in it. He is willing to comply with all police regulations, properly such, in the exercise of it. He will not offend in any particular the regulations which the legislative or the municipal authorities may adopt. He will observe times, seasons, places, localities. But that is not enough. He is required to land his cattle on a privileged person's landing; to keep them in that person's yard or pen; to slaughter them in that person's house, and to pay a burdensome toll for these restrictions. He may construct a landing, a yard, a slaughterhouse equally as good within the prescribed limits of locality, and subject to all the necessary regulations, but that will not do. He must go to the privileged person and use his premises and pay for their use.

This is not because the privileged person is the inventor of such accommodation, nor because the use of them is a franchise lying only in the public grant, nor because the privileged person is qualified by superior education and license, nor because he has received a municipal license as a herdsman or a butcher, but because he has obtained the exclusive privilege granted by the act. The *ipse dixit* of the legislature assigns a lawful and ordinary employment to one set of men, and denies and forbids it to another.

The injustice perpetrated under acts of irresponsible legislation has become a crying evil in our country. And while it must generally be without redress, except through the action of the elective body or the local courts, yet in those instances where the federal constitution has provided a remedy, we ought not to shrink from granting the appropriate relief. We do not give any weight to imputations upon the honesty or integrity of the legislature, the courts or the executive of the state.

We are not authorized to do so. We are bound to presume, and do presume, that they have severally acted in good faith, and with an honest purpose not to transcend the limits of their constitutional powers. They have their duties to perform; we have ours. And whilst we feel it due to them to examine

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their acts with great caution and due respect, we nevertheless feel bound to exercise an independent judgment. Unless this be done by all who have public duties to perform, there will be no certain foundation to stand upon.

In the exercise of that judgment, we feel compelled to decide that the act in question is a violation of one of the fundamental privileges of the citizen, and that an injunction would have to be granted substantially as prayed for, but for one of the technical objections raised by the answer of the defendants.

The objection that the circuit court of the United States can not enjoin proceedings in the state court, is an objection which can not be surmounted.

The fourteenth amendment authorizes congress by appropriate legislation to carry its provisions into effect. Congress, in the exercise of the power thus given, would undoubtedly have the right to authorize the federal courts to take jurisdiction of cases of this sort and to enjoin proceedings in the state courts, as well as proceedings in the federal courts. But congress has not as yet assumed that jurisdiction; and therefore the courts are left to the provisions regulating the proceedings of the United States courts passed seventy or eighty years ago. The third section of the act of 1793 declares that no writ of injunction shall be granted to stay proceedings in any court of a state. This act has never been repealed. The court, therefore, feels compelled to refuse the injunction, to restrain the defendants from proceeding with the legal remedy which they had instituted in the state courts.

The remedy of the parties is to allow the proceedings to pass to judgment, and if the highest court of the state shall decree against the construction of the fourteenth amendment, which is claimed by them, and which this court has assented to, then they can carry the case up by writ of error to the supreme court of the United States, and have the whole question reviewed.

At the opening of the court on the next morning, Justice BRADLEY made the following announcement:

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In the Slaughter House case, yesterday, we expressed the opinion that the civil rights bill did not apply to the case; that it was intended merely to secure to all citizens, of every race and color, the same privileges as white citizens enjoy, and not to modify or enlarge the latter. This portion of the opinion had not been put in writing at the time, and was somewhat hastily expressed. Our attention had been chiefly given to the main question — the true construction of the fourteenth amendment. On a more careful examination, considering that the civil rights bill was enacted at the same session, and but shortly before the presentation of the fourteenth amendment was reported by the same committee, was *in pari materia*, and was probably intended to reach the same object, we are disposed to modify our opinion in this respect, and to hold, as the counsel on both sides seem to agree in holding, that the first section of the bill covers the same ground as the fourteenth amendment, at least so far as the matters involved in this case are concerned.

And whilst we still hold that the act is not intended to enlarge the privileges and immunities of white citizens, it must be construed as furnishing additional guarantees and remedies to secure their enjoyment; and this is probably the reason why congress has neglected to pass an additional law for carrying the fourteenth amendment into effect, the civil rights bill being regarded as having already supplied the necessary provisions for that purpose. \* Still, this bill has not repealed the law which prohibits the federal courts from issuing an injunction to stay proceedings at law in the state courts. The prayer for injunction will, therefore, stand denied to that extent, but granted as to the residue, and the rule will be corrected accordingly.

An injunction issued in accordance with this decision.

WOODS, Circuit Judge, concurred.

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\* The act of May 31, 1870, which reenacted the civil rights bill, had not come to the knowledge of the court when this opinion was delivered.

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The following is a copy of the order made by the court:

This cause came up before the court upon a motion for a special injunction, and was argued by counsel for the plaintiffs and defendants, and thereupon it is declared by the court that the said plaintiffs are entitled to land, keep or slaughter any cattle, beeves, calves, sheep, swine or other animals, and to have, keep or establish any stocklanding, yards, pens, slaughter-houses or abattoirs at any point or place on the east bank of the Mississippi river within the parish of St. Bernard or in the corporate limits of the city of New Orleans below the United States Barracks, or at any point on the west bank below the present depot of the New Orleans, Opelousas and Great Western Railroad Company to the same extent of right as the said Crescent City Live Stock Landing and Slaughter House Company have and enjoy, subject to inspection and such other police regulations as the said company and others engaged in like employment are subject to, and that the said parties plaintiffs, may carry on the live stock landing and slaughter house business, and may prepare animal food for markets, and may vend and dispose of the same, and may keep and maintain animals for use, and erect wharves, sheds, stables and yards, and do whatever it may be lawful for the said defendants to do under the terms of their act of incorporation, as an exclusive privilege, subject to like regulations as aforesaid. And the court directs that an injunction be issued from this court enjoining and restraining the defendants from commencing or prosecuting any other suits upon this act of incorporation than such as are now pending against the said plaintiffs, or either of them, for doing or performing any act embraced in the declarative clause of this decree, or for suing for any fine or penalty imposed in said act of incorporation for doing or performing any of the acts aforesaid, and from interfering with them in the prosecution of their lawful occupations as live stock dealers or butchers, or as vendors of animal food or animals.

And the said court here excepts from the operation of this decree the proceedings in any of the courts of the state that are now pending, but reserves to such plaintiffs all other remedies

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**Marionneaux's Case.**

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for their protection contained in the constitution of the United States and act of congress, whereby, in the lawful pursuits aforesaid, they may be deprived of the rights here declared and ascertained.

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**MARIONNEAUX'S CASE.**

1. A bankrupt's discharge will not be set aside where the fraudulent acts on which petitioning creditors rely for the annulling of the discharge were suspected and believed to exist before the discharge, and when the evidence (discovered after the discharge) to prove such fraudulent acts is incompetent and inadmissible.
2. When upon the whole record it appears that the petitioner had no case, the judgment of the court below will not be reversed, even though the court may have erred in some of its rulings.

This was a petition filed in the district court by certain creditors of A. P. Marionneaux, a bankrupt, to annul his discharge, on the ground that it was fraudulently obtained.

*Mr. Chas. E. Fenner*, for petitioners.

*Messrs. E. C. Billings & A. de B. Hughes*, for bankrupt.

WOODS, Circuit Judge. The petition alleges in substance that the order of discharge was granted on February 24, 1869; that the bankrupt fraudulently concealed and failed to surrender for the benefit of his creditors a certain judgment in the case of *John L. Pointer v. The Mutual Insurance Company*, rendered in the sixth district court of New Orleans parish. That said judgment was really the property of the bankrupt, but the consideration on which it was founded was fraudulently conveyed to Pointer; that for the purpose of giving value to the transfer, Marionneaux took from Pointer a note or notes, which he held prior to and at the time of the adjudication in bankruptcy, and that he neither surrendered the property in the judgment, nor the notes.

That the petitioners have long suspected and believed the said facts to be true; they were always stoutly denied by

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Marionneaux and by Pointer, and petitioners had no knowledge of the same until after the discharge of Marionneaux, when, from the dying declarations of Pointer, who died on February 20, 1869, and certain provisions in his will, they did ascertain that the facts in reference to said judgment were as stated by them in their petition.

I have been unable to determine how this case comes into this court. It is called an appeal, but there is no testimony submitted to the court, and the agreed statement of facts does not cover all the questions of fact in dispute in the court below. There are two bills of exceptions incorporated in the record, which would indicate that the case is here on error, but there is no writ of error, assignment of error, prayer of reversal or joinder in error.

If the case is considered as an appeal, it is sufficient to say that there is no testimony whatever submitted to the court, and the agreed facts do not prove or tend to prove that the discharge in bankruptcy of Marionneaux was fraudulently obtained. On the contrary, the agreed facts do not touch that question at all. This court cannot, of course, say that the discharge ought to be set aside for fraud when there is no testimony whatever showing fraud.

Regarding the case as here upon error, we might affirm the judgment of the court below, because no errors are assigned.

I have, however, looked into the record to ascertain whether the court below fell into any error for which its judgment should be reversed.

I think it very clear that if the petitioning creditors relied solely upon testimony to prove that Marionneaux obtained his discharge by fraud, which was known to them before the discharge, and which in fact they had used in a judicial proceeding to establish the identical act of fraud set up in this petition, they have no standing in court. If we look into the record we find that they did rely on other testimony, namely, the dying declarations of Pointer, and certain provisions in his will which could be considered as nothing more than dying declarations reduced to writing.

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It is a well settled rule of evidence that dying declarations are admissible only in criminal cases, and when the death of the deceased is the subject of the charge and the circumstances of the death are the subject of the dying declarations. *Rex v. Mead*, 2 B. & C., 605; 1 Greenl. Ev., sec. 156.

As dying declarations, the statements of Pointer were clearly inadmissible. Nor could they be admitted as the declarations of one of two conspirators, for to make such proof competent, it must be preceded by proof of the conspiracy. 1 Greenleaf's Ev., sec. 111. They cannot be given as a part of the *res gestæ*, for the declarations were long subsequent to the transactions to which they relate. *Rawson v. High*, 2 Bingham, 99, 104; 9 Eng. Com. Law, 335; *Marsh v. Davis*, 24 Ver., 363; *New Milford v. Sherman*, 21 Conn., 101; *Johnson v. Sherwin*, 3 Gray, 374.

This additional proof, then, on which petitioning creditors relied, was the merest hearsay evidence, and not admissible; and, in fact, was no evidence at all. This testimony, when offered, would have been properly excluded, and that would have left the petitioning creditors to rely solely on facts which were well known to them long before the discharge of Marionneaux, to prove fraud in obtaining his discharge.

So that, even if the court below erred in its rulings, it did not err to the damage of petitioning creditors. They had no case, and could not by any possibility have succeeded had the rulings of the court been in their favor upon all the points reviewed.

In their petition they set out the nature of the new evidence that they have discovered since the discharge of Marionneaux. It is the dying declarations of Pointer. The record shows that they had no case, and that their petition should have been dismissed.

A writ of error brings up the whole record, and the plaintiff in error may take advantage of a fatal defect in the declaration. *Bank v. Smith*, 11 Wheaton, 171.

There is no error in this record for which the judgment should be reversed.

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White vs. Red Chief.

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## WHITE VS. RED CHIEF.

1. A capture of a steamer, within the insurrectionary district, by the forces of the United States, vested in the government of the United States an absolute title to the property, without the necessity of any legal condemnation.
2. The fact that the libellant, who was at the time of the capture resident in the district in insurrection, afterwards came into the United States and took the oath prescribed by the acts of congress, could not divest the title of the government.

## ADMIRALTY APPEAL

*Messrs. C. S. Kellogg and R. H. Shannon, for libellant.*

*Messrs. C. Roselius and R. Waples, for respondent.*

WOODS, Circuit Judge. The libel in this case was filed June 3, 1864, and alleges in substance that libellant is a resident of the city of New Orleans, and that the steamer libelled was in charge of S. B. Holabird, chief quartermaster of the department of the gulf.

That libellant is the lawful owner of the steamer Red Chief, and for a long time had the possession of her as owner. That on the 11th day of March, 1863, libellant purchased said steamer at Shreveport, Louisiana, for his own individual use and profit. That on the 12th of March, 1863, while libellant was making a trip on his own account for private parties on the Mississippi and Red rivers, the so called Confederate States government siezed and impressed said boat against his will and consent. That a military force with an officer was sent on board said steamer and he was compelled to submit to their orders. That the so called Confederate States government, by its officers and men, took said steamboat to Port Hudson, where it remained till that place surrendered to the United States forces on July 8, 1863, when said boat was taken in possession and turned over to said Holabird, chief quartermaster of the department of the gulf.

That libellant is and ever has been a loyal citizen of the United States, and has never aided or abetted the rebellion by

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White vs. Red Chief.

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word or deed, but has taken the oath prescribed by the proclamation of the president of December 8, 1863, and before then, to-wit, on October 15, 1863, had taken an oath to support, protect and defend the United States against internal, civil and foreign enemies.

This is the case as stated by the libellant, and upon his own showing, I think his libel ought to be dismissed.

According to the libel the libellant, at the time of his purchase of the Red Chief, and of her seizure by the confederate forces, was resident and doing business within the enemies' territory, and whatever his private sentiments may have been, he was in contemplation of law an enemy of the United States.

"This court," says Mr. Chief Justice CHASE, in *Mrs. Alexander's Cotton*, 2 Wall., 419, "cannot inquire into the personal character and dispositions of individual inhabitants of every territory. We must be governed by the principle of public law, so often announced from this bench as applicable alike to civil and international wars, that all the people of each state or district in insurrection against the United States must be regarded as enemies, until by the action of the legislature and the executive, or otherwise that relation, is thoroughly changed."

This steamer then was not only the property of an enemy, but was taken from him by the troops of the insurgents, and used in carrying on the war against the United States. While so used, she was captured by the military forces of the United States.

Even in the possession of the libellant, the capture would have been justified, by the peculiar character of the property. *Mrs. Alexander's Cotton*, *supra*. It is well known that steamers constituted one principal reliance of the insurgents as a means of transportation for troops, commissaries' supplies and munitions of war. *A fortiori* in the hands of the insurgent troops, and actually in use by them in promoting the rebellion, was this steamer a proper object of capture by the union forces?

After her capture, and while still in the possession and use of the United States forces, the libellant seeks to regain possession

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The United States vs. Rob Roy and Cargo.

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of her and take her from the hands of her captors, by an appeal to the admiralty courts of the United States.

We think it clear that he had no claim. The title of the United States was perfect and complete by capture in war and was not open to adjudication in the courts.

The fact that the libellant afterwards came within the United States military lines, and took the oath referred to in his libel, could not divest the title of the government. That was perfect and was not liable to any such defeasance.

But it is charged in the libel that there had never been any legal adjudication or condemnation of the steamer. No legal condemnation was necessary or proper. By express provision of the act of March 12, 1863 (12 Stat., 820), captured property might either be sold and the proceeds turned into the treasury or it might be appropriated to public use on due appraisement.

There is nothing in this record to show that this property was not so appropriated to the public use.

Commencing legal proceedings is a novel method of wresting from the hands of military captors property taken from the enemy in open war.

I find nothing in this record to show that libellant has any title to the property libelled.

The libel is therefore dismissed at the costs of the libellant.

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THE UNITED STATES VS. ROB ROY AND CARGO.

1. When a steamboat and her cargo of cotton were seized by the United States for condemnation, and delivered to the claimant on his execution of a bond for the redelivery of the property, the amount of the judgment to be rendered in a suit on the bond would be the value of the property, estimated at the highest price that could be obtained for it, between the date of the bond and the date of the judgment.
2. The United States seized and filed a libel against a steamboat and cargo, as liable to forfeiture for violation of the rules of war. The claimant gave bond for the property, and made an unsuccessful defense against the libel, but set up as a defense to a judgment against him

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The United States vs. Rob Roy and Cargo.

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on the bond his discharge in bankruptcy. *Held*, that the debt evidenced by the bond was not created by fraud within the meaning of the thirty-third section of the bankrupt act, even though the claimant used the evidence of false witnesses, and swore falsely himself in making his defense.

3. When the claim evidenced by such bond was not reduced to judgment until after the adjudication of bankruptcy and the final dividend, *held*, that it was not provable against the bankrupt estate, and consequently was not barred by the bankruptcy.
4. A discharge in bankruptcy does not bar debts due the United States.

In this case a decree had been rendered in favor of the government upon the libel, and the court was called on to pronounce judgment against the claimant and his sureties upon the bond executed by them for the redelivery of the property seized, to the United States. Upon this branch of the case several questions were raised which were disposed of in the following opinion.

*Messrs. A. B. Long*, U. S. Attorney, and *J. S. Whitaker*, for the United States.

*Mr. J. A. Campbell*, for the respondents.

BRADLEY, Circuit Justice. In this case a decree has been rendered on the merits in favor of the United States, and judgment has been entered against the sureties for the several sums in which, by way of penalty, they were bound for the safe return by the claimant of the cotton which was delivered to him. The true amount due, and the true amount to be paid by each surety, will have to be ascertained by testimony as to the value of the cotton at the time it was bonded and at any time since. Having been taken out of the possession of the government, the latter is entitled to such amount as could, at any time since the delivery, have been obtained for the same.

A question still remaining to be decided is, whether the claimant, A. S. Mansfield, is or is not discharged from liability on the bond, by reason of his having received a discharge in bankruptcy. He has pleaded such discharge, dated June 30, 1869, purporting to be a discharge from all debts due by him which existed June 1, 1868, on which day the petition for his

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**The United States vs. Rob Roy and Cargo.**

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adjudication as a bankrupt was filed. The solution of this question depends upon that of one of two others.

*First.* Is the claim itself such an one as would be affected by a discharge in bankruptcy?

*Secondly.* If it is, will a discharge in bankruptcy bind the United States?

I. Under the first head, it is claimed on the part of the government that this is a debt created by *fraud*, and therefore not entitled to the benefit of a discharge under the bankrupt act. The government seized the steamer Rob Roy and her cargo as liable to forfeiture for acts done during the war. These acts were in violation of the rules of war, as adopted by the United States. The title of the government rested on such unlawful acts. The claimant, when the property was seized, came into court and undertook to defend the suit, and on giving a bond, which was then satisfactory, the property was delivered to him. Now, the appearance of the claimant in court, and his bonding the property, are the transactions on which the present claim is based. They cannot be regarded as fraudulent. Every person is entitled to come into the courts and prosecute and defend his suits in the ordinary way. The government proved the unlawful acts—the claimant failed to make good his defense. It is said that, in making his defense, the claimant used the evidence of false witnesses, and swore falsely himself. That, if true, was more than a fraud; it was a crime. But it is not a fraud by which this debt or obligation was created, and does not bring the case within that class of exceptions.

In the next place, it is insisted that the claim was not *provable* in the proceedings in bankruptcy, and therefore was not subject to discharge.

By the 34th section of the Bankrupt Act it is enacted, that a discharge duly granted shall, with certain exceptions referred to, release the bankrupt from all debts, claims, liabilities and demands, which were or might have been proved against his estate in bankruptcy. The 19th section declares what debts and claims shall be thus provable. A careful examination of the debts and claims here described will show that the claim

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in question was not one of them. To have been such, it must have been either—1st, a debt due and payable at the time of the adjudication of bankruptcy, or a debt then existing but not payable till a future day. It was neither of those. Or 2d, a demand for goods wrongfully taken, converted or withheld. It was not this. Or 3d, a liability as drawer, indorser, surety, bail, or guarantor on a bill, bond, note, specialty, or contract, or debt of another person. It was not this. Or 4th, a contingent debt, or contingent liability, where the contingency happens before the order for final dividend, or where the present value of the debt or liability can be ascertained and liquidated. The contingency on which the liability in this case was depending was the final decision of the case, which could not be known, anticipated, or valued by any method of discount or any calculation of probabilities or chances whatever. That decision was not made till the present term of the court. It is not shown when the final dividend of Mansfield's estate in bankruptcy was made; and consequently we can recognize its operation only upon claims which had become liquidated or fixed at the time of the adjudication of bankruptcy. The residue of the section is regulative of the claims already described; and it closes with the declaration, that no debts other than those thus specified shall be proved or allowed against the estate.

II. This decides the case, without making it necessary to examine the other question, whether the United States is affected by the discharge of its debtor in bankruptcy. On this point, the case of *United States v. Davis*, in 8 McLean, 484, is undoubtedly a precedent in favor of the validity and operation of a discharge, as against a debt due the government, being founded on a bankrupt act similar on this point to the present act. Were it not for that precedent, we should not hesitate to take a different view. There is nothing in the act itself which necessarily implies that a discharge under it was intended to operate upon claims of the government. The 33d section, which declares that no debt created by the fraud or embezzlement of the bankrupt, *or by his defalcation as a public officer*, or while acting in a fiduciary capacity,

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shall be discharged under the act, is not sufficient to raise an implication that debts due to government, other than those which arise by defalcation as a public officer, will be discharged. There are public officers of the several states, as well as public officers of the United States; and they are undoubtedly included in this phrase.

Neither does the proviso at the end of the 28th section raise any such implication: "That nothing contained in this act shall interfere with the assessment and collection of taxes by the authority of the United States or any state." This proviso has the effect of preventing the assignee from interfering with the process for collecting such taxes. He cannot take the property out of the hands of the tax collector, or other tax officer, and cause them to wait till he is ready to pay over the taxes. He cannot interfere with them in any way. Other claims of the government are to be paid by the assignee out of the proceeds of the property, before he attempts to make any dividend to the creditors. Taxes are to be collected by the tax officers themselves. We do not think that either of these provisions affects the question before us.

The general rule is, that the government is not bound by any law which would affect its rights, unless specially mentioned therein. This rule is so imperative as not to be displaced, we think, by any such ambiguous expressions as those which are relied on.

The point, so far as we are aware, having never been decided by the supreme court, we do not feel bound by the decision in 3 McLean, *supra*, but are of opinion that the federal government is not bound by a discharge under the bankrupt act.

The plea of bankruptcy is overruled, and judgment will be entered against Mansfield for the entire amount found to be due.

NOTE.—Since this case was decided, the United States supreme court has held that a discharge in bankruptcy does not discharge debts due the United States. See *U. S. v. Herron*, 20 Wall., 251.

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The United States vs. 337 Cases of Wine.

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## THE UNITED STATES VS. 337 CASES OF WINE.

1. Error in excluding depositions of witnesses cannot be considered in the appellate court when the bill of exceptions does not identify the depositions, but they are inserted in the copy of the record by the clerk, more than two months after the signing of the bill of exceptions.
2. Judgment will not be reversed because the court refused to give a charge, abstractly correct, but which the bill of exceptions does not show was pertinent to the case on trial.
3. When imported goods are libelled by the government for undervaluation, upon proof of the undervaluation, a fraudulent purpose will be implied, and claimant must rebut this implication by evidence showing an innocent mistake.

ERROR to the District Court for the District of Louisiana.

*Mr. A. B. Long*, U. S. Attorney, for the United States.

*Messrs. J. S. & W. R. Whitaker*, for claimant.

WOODS, Circuit Judge. The first error assigned in this case is presented by the second bill of exceptions, and is to the ruling of the court in excluding the depositions of certain witnesses taken upon letters rogatory and interrogatories. Neither the depositions themselves, nor copies thereof, are incorporated in or attached to the bill of exceptions, or referred to by letter, number or other mark, so that it is impossible for this court to say that the court below fell into error in excluding them. It is true the names of the witnesses whose depositions were excluded, the date of the letters rogatory, the date of the filing of the interrogatories, and the date of the filing of the depositions in the court below are given, and what purports to be a copy of the depositions of the said witnesses in the French language, and a translation thereof into the English language, is found in the body of the record. But this is not sufficient. These copies have no business in the record save as a part of the bill of exceptions. The clerk had no authority, and it was improper for him to insert these copies in the record. There is no evidence that the copy is a correct one, or that the translation is a correct one. A bill of exceptions must be verified

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The United States vs. 337 Cases of Wine.

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by the hand and seal of the judge, and every exhibit to a bill of exceptions must so far be made a part of it, that the verification of the bill by the judge shall extend to the exhibit, and if it is a copy, show that the copy is a correct one.

If this bill of exceptions had incorporated the depositions into the body of it, or had referred to it thus: "The depositions of the witnesses, O. P., Q. R. and S. T., a copy (or the original) of which is hereto annexed, marked exhibit 'A,' and made a part of this bill of exceptions," such a designation of the depositions would have been conclusive, and the verification of the bill of exceptions by the hand and seal of the judge would have extended to and covered the exhibit, and, if the exhibit was a copy, would have certified the correctness of the copy. This bill of exceptions was signed and filed by the district judge, July 10, 1869. The copy of the depositions was made, as appears by the certificate of the clerk, October 22, 1869. So that it is clear that before the signing of the bill, the judge had not inspected or seen this copy, and certainly did not certify to its correctness when he signed the bill of exceptions. These copies of these depositions are certainly no part of this bill of exceptions, and this court cannot consider whether or not they were improperly excluded. To show that this strictness is not unwarranted, I refer to the case of *Leftwich v. Lecanu*, 4 Wallace, 187.

The next error said to be in this record is in the refusal of the judge of the district court to give certain charges to the jury, as requested by counsel for claimants. Several of these charges embody the same idea in different forms, and, as the most clear and precise of these, I copy the fourth charge requested. It is in these words:

"If the jury shall find, under instructions from the court in matters of law or in any other way, that the invoice valuations of the wines under seizure did not conform to the actual valuations of such wines in the actual markets of the country of production, as required by the revenue laws of the United States, still they cannot return a verdict for the government unless they shall also find that such discrepancy was not the

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The United States vs. 887 Cases of Wine.

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result of honest error on their part in respect of law or fact, but was made knowingly, with guilty knowledge, with design to evade the payment of duty which they knew was legally chargeable on the merchandise."

So far as appears from the bill of exceptions, this charge, and all charges of the same purport, were properly refused.

When an undervaluation of imported goods is established by the proof, unless it is shown to have occurred by mistake or accident, it follows inevitably that the undervaluation must have been made with intent to defraud the revenue. Since the passage of the act of March 2, 1799, the policy of the revenue laws of the United States is to throw the burden of proof upon respondent to show mistake or error, when the government has in the first place proven undervaluation.

So that when, in this case, the United States had established the undervaluation of the goods, the inference of the law was that there was guilty knowledge and guilty intent, and in the absence of any proof on the part of claimants of mistake or accident in making the valuation, the court might well say to the jury that they were to presume knowledge and guilty purpose. This was, however, a presumption which claimants might, and which it stood them in hand to rebut by proof, and if they had offered any evidence tending to show mistake or error, then the charge requested might have been and should have been given. But this bill of exceptions utterly fails to show that any such proof was offered. The issue is, that the claimants had entered undervalued goods, and the court properly charged that, if undervaluation was shown, in the absence of proof of mistake or accident, the presumption of guilty knowledge and intent must prevail.

It is further alleged as error, that the court refused to give the following charge to the jury:

"If wines of equal value and similar to those seized in this suit were worth in Bordeaux, at the fair and usual market price there, no more than the price stated in this invoice at the date of this shipment, then these wines cannot be condemned for undervaluation."

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**Butchers' Association vs. Slaughter House Company and other cases.**

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In *Vasse v. Smith*, 6 Cranch, 226, Chief Justice MARSHALL lays down this rule: A bill of exceptions ought to state that evidence was offered of the facts upon which the opinion of the court was prayed.

In *Dunlap v. Munroe*, 7 Cranch, 270, JOHNSON, J., says: Each bill of exceptions must be considered as presenting a distinct substantive case, and it is on the evidence stated in itself alone the court is to decide.

All the testimony upon which the charge is based must be incorporated in the bill of exceptions when the party wishes to review the charge upon writ of error.

I apply these well settled rules to this assignment of error. This bill of exceptions nowhere shows that any evidence whatever was offered upon the point on which the instructions to the jury just recited were asked. If there was no such evidence, and that is the presumption, as the record fails to show it, the court was right in refusing the charge. As far as I can see from the record, the charge asked was purely abstract, and had no reference to any facts proven in the case, and it was the right and duty of the court to refuse it.

I see no error in this record. Let the judgment of the court below be affirmed.

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AT CHAMBERS, JUNE, 1870.

[Before Judge BRADLEY as a Justice of the Supreme Court of the United States.]

**BUTCHERS' ASSOCIATION VS. SLAUGHTER HOUSE COMPANY,  
and other cases.**

1. Where the supreme court of a state gave judgment for a perpetual injunction against defendants, and they sued out a writ of error to the supreme court of the United States, and within ten days gave bond in the sum of \$10,000 to supersede the judgment of the state court, a justice of the United States supreme court refused, on motion, to re-

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**Butchers' Association vs. Slaughter House Company and other cases.**

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quire plaintiffs in error to give an additional bond with a larger penalty, although satisfied that the bond already given was not sufficient to cover the fees and emoluments claimed by defendant in error, which would come to the possession of the plaintiff in error by reason of the *supersedeas* of the judgment of the state court.

2. As soon as a writ of error from the United States supreme court is applied for and allowed, the jurisdiction of that court attaches and supersedes any further action of a justice of that court at chambers.
3. It seems to be the settled understanding of the courts of the United States that both appeals and writs of error operate as a *supersedeas* without any express order to that effect, if taken within the proper time and with an offer of the requisite security.

On the 3d of June, 1873, an application was made to Mr. Justice Bradley of the supreme court of the United States, at chambers, in New Orleans, to require additional bonds in those cases, in which writs of error to the supreme court of the United States had been allowed and bonds already given. Upon this application the following opinion was delivered by him.

*Messrs. C. Roselius, W. H. Hunt and J. P. Horner, for motion.*

*Messrs. John A. Campbell, J. B. Cotton and J. Q. A. Fellows, contra.*

BRADLEY, Circuit Justice. In these cases writs of error were allowed, and bonds to prosecute and to answer all damages and costs were taken within ten days from the rendering of the decrees in the state court, to which the writs were directed. The bonds were required in such amounts respectively as then appeared to me sufficient, being the same as required on appeal from the state district to the state supreme court. Affidavits have since been laid before me, for the purpose of showing that the amount of the bonds is not sufficient as security for the damages which the defendants in error will sustain if the writs are to be deemed a *supersedeas* of the decrees and executions thereon, and if the decrees should be affirmed.

In the private suits the decrees are not for sums of money, except as to costs; but in the suits of defendants in error, they are for perpetual injunctions against the plaintiffs in error,

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**Butchers' Association vs. Slaughter House Company and other cases.**

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to restrain them from violating the exclusive right granted to the defendants of having cattle landings, live stock depots and slaughter houses in New Orleans. In the suits of the plaintiffs in error, the decrees are for the dismissal of the petitions, and a dissolution of the injunction obtained by the plaintiffs. If these decrees should severally be affirmed, there would still be no decree against the plaintiffs in error for the payment of any money, other than the costs; but only for the perpetuity of the injunctions of the defendants and the dissolution of the injunctions of the plaintiffs.

But the defendants in error insist that they will, in the mean time, sustain damage by the suspension of their injunctions if they are suspended by the writs of error, and by the continuance of the plaintiffs' injunctions, if they are continued by the writ of error, and that this damage will be largely in excess of the bonds taken on allowing the writs of error. I do not see any evidence that this effect will follow in any case but that of the Live Stock Dealers and Butchers' Association against the Crescent City Live Stock Landing and Slaughter House Company. In this case it does appear that the probable emoluments and fees which will accumulate and become due from the plaintiffs to the defendants in error during the pending of the appeal, will largely exceed the amount of the bond taken. The bond is in the penalty of \$10,000, and the fees will probably accumulate in one year to the amount of over \$60,000. But have I any right to demand a bond sufficient to guaranty the payment of this accumulation of fees? At first I supposed I had such a right; and I purposed requiring a bond to be given to the amount of \$100,000. But on a more careful examination of the cases, particularly of the case of *Roberts v. Cooper*, 19 Howard, 379, I am satisfied that it would not be competent for me to do so. In that case a plaintiff in ejectment recovered the land and nominal damages. The defendant brought a writ of error and gave a bond of only \$1,000, being all that the judge required. An affidavit being presented to the court, showing that by being kept out of possession pending the writ of error, the plaintiff would suffer

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\$25,000 damages, the court refused to order an increase of the bond, holding that the case was not provided for by any legislation of congress.

On further examination, I am not entirely satisfied that I could now order an additional bond, if one were proper to be demanded. The language of several of the cases seems to imply that as soon as the writ of error or appeal is allowed, the jurisdiction of the supreme court attaches to the case, and supersedes the further action of the judge at chambers. In the *Rubber Company v. Goodyear*, 6 Wallace, 156, the court says: "In equity cases, the appellate jurisdiction of this court attaches upon the allowance of the appeal." And again: "The question of sufficiency (of the bond) must be determined in the first instance by the judge who signs the citation, but after the allowance of the appeal, this question, as well as every other in the cause, becomes cognizable here." I am referred to one case, that of *Black v. Zacharie*, 3 Howard, 493, in which the circuit court for the District of Louisiana annulled their order for a *supersedeas* on account of the insufficiency of the bond. In the cases before me, I have made no order for a *supersedeas*, but have left the cases to the legal effect of the several writs of error allowed, having simply approved the several bonds which were tendered in the cases. That approval undoubtedly imports that the bonds are sufficient for a *supersedeas* of further proceeding under the decrees, so far as a writ of error can legally operate as such, and to that extent it was my intention that they should operate.

The question as to what is the legal effect of writs of error on subsequent proceedings in these cases, it is not necessary for me to decide. The suits are really suits in equity, the relief sought being an injunction, which is purely equitable relief.

In England, appeals from decrees in equity do not suspend proceedings in the court below, nor the operation of the orders or decrees appealed from, unless, on special application, an order to that effect be made, either by the court appealed from or the court appealed to. But the reason for this rule seems to be that appeals are allowed

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there from interlocutory as well as final orders and decrees ; and if every appeal had the effect of suspending further proceedings, no case would ever be determined except by consent of parties. *The Warden v. Morris*, 9 Vesey, jr., 316; *Huguenin v. Basely*, 15 id., 184; *Waldo v. Caley*, 16 id., 206. And it seems to be the settled understanding of the courts of the United States, in which and to which appeals are only allowed from final decrees, that an appeal, as well as a writ of error, operates as a *supersedeas*, if taken within the proper time and with an offer of the requisite security.

"The act of 1803," says Mr. Justice McLEAN, in *Stafford v. The Union Bank of Louisiana*, 16 Howard, 139, "places appeals in chancery on the same footing as writs of error. And in the case of *Catlett v. Brodie*, 9 Wheaton, 553, this court held that security must be given on a writ of error to operate as a *supersedeas* for the amount of the judgment." And again, "there is no discretion to be exercised by the judge taking the bond when the appeal or writ of error is to operate as a *supersedeas*. This rule was established in 1817, and has been adhered to ever since." *Id.*, 140. In the *Rubber Company v. Goodyear*, 6 Wallace, 156, the court say: "What is necessary, is, that it [the security] be sufficient, and when it is desired to make the appeal a *supersedeas*, that it be given within ten days of rendering the decree."

But suppose it to be granted that an appeal, properly allowed, is a suspension in equity cases as well as in cases of law ; of what is it a *supersedeas*? Does it supersede the decree? Will a defendant, after appealing from a decree for specific performance requiring him to execute a deed, be amenable to an attachment if he neglects to execute such deed?

It would seem to be the logical consequence that the whole effect of the decree is suspended, and that without some special order to the contrary (which it seems can only be made by the appellate court), things must remain *in statu quo ante decretum* until the appeal is determined.\*

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\*This subject is discussed, and a somewhat different view taken in "Slaughter House Cases," 10 Wall., 273.

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The United States vs. Gay's Gold.

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But on this subject parties must take the law at their peril, as I cannot, sitting here, make any judicial determination which will bind them.

The result simply is that I must, under the circumstances, decline to take any further action with regard to the securities.

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THE UNITED STATES VS. GAY'S GOLD.

An attempt was made to transport without a license, and contrary to the 80th section of the act of congress of July 13, 1861, and 8d section of the act of May 20, 1862, property from the United States to the territory declared to be in insurrection: *Held*, that such property becomes subject to forfeiture to the United States, notwithstanding the insurrectionary district to which it was being conveyed was at the time in the possession of the federal forces.

APPEAL from the District Court.

*Mr. Alanson B. Long*, U. S. Attorney, for libellant.

*Mr. Geo. L. Bright*, for claimant.

WOODS, Circuit Judge. This is a libel filed against \$5,000 in gold seized on board the steamer "Empire Parish," on the Mississippi river, in the port of New Orleans. The libel charges that the gold was being transported to Bayou Sara, in the state of Louisiana, a place declared to be in insurrection, contrary to the 5th section of the act of congress of July 13, 1861 (12 Stat., 257), and the 3d section of the act of May 20, 1862 (12 Stat., 404).

The facts are, that the gold was taken on board the "Empire Parish," by one Smith Freeman, for the purpose of carrying the same up the river, either to Bayou Sara, or to the residence of the owner of the gold, E. J. Gay, near the village of Plaquemine, both Bayou Sara and Plaquemine being in a section declared to be in insurrection.

The defense seems to be, that the purpose of Freeman was to carry the gold to its owner, Gay, who resided a mile and a

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**Gaines vs. Lizardi and others.**

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half below Plaquemine, on the right bank of the Mississippi river, and that at the time Plaquemine and its neighborhood were held by the union forces.

Admitting all that the testimony for the claimant tends to establish, yet it is clear that this gold should be forfeited. There is no pretense that its transportation was authorized by any permit or license whatever. It is admitted that the purpose was to transport the same to a place declared to be in insurrection, and whether such place was held by troops of the United States or not can make no difference. The act of congress forbids the transportation of gold to any place declared to be in insurrection, whether held by union troops or not, and the proclamation of the president, March 31, 1863, declares the whole state of Louisiana to be in insurrection, except the port of New Orleans. So it is clear that here was a transportation commenced of property from a section not in insurrection to a section declared to be in insurrection, contrary to the plain provisions of the act of July 13, 1861, and by that act declared to be forfeited to the United States.

I am satisfied from the testimony that it was the purpose of Gay, the claimant, to use this gold in the purchase of cotton in the insurrectionary districts. The pretense that he ordered his gold from its safe depository in New Orleans to his plantation, merely to hoard it, is too transparent to deceive any one.

Let a decree be entered against the gold and the principal and sureties on the release bond.

NOTE. — See *Gay's Gold*, 13 Wallace, 858.

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GAINES VS. LIZARDI and others. SAME VS. DE LA CROIX  
and others. SAME VS. NEW ORLEANS.

1. The decision of the supreme court of the United States in these cases did not authorize this court to enter a decree for complainant against defendants for the proceeds of lands which were in their possession, but which they had sold before the filing of the bills in these cases.

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- 2 Where a party is in possession of lands, claiming under an adverse but defective title, without any fraud either of himself or his grantors, he cannot be held to be the trustee of the party holding the true title, nor if he has sold the lands, made to account for the proceeds of the sale to the true owner.
8. The decree of the supreme court in these cases found that the defendants were not possessors in good faith of the lands sued for. They were therefore liable for rents and profits, and were not entitled to compensation for their improvements.

These cases had been taken by appeal to the supreme court of the United States, and a decree was rendered by the court in December term, 1867 (see the opinion, 6 Wallace, 642), and a mandate was sent to this court. But Judge Durell having recused himself on account of interest, no decree had as yet been entered to carry out the mandate. The case came up on motion to enter the proper decree.

*Mr. John A. Campbell*, for complainant.

*Messrs. McConnell and Taylor*, for defendants.

BRADLEY, Circuit Justice. These cases are before us on mandates from the supreme court of the United States, and motion is made to enter the proper decrees, pursuant to said mandates.

By reason of the explicit manner in which the views of the supreme court are expressed in its opinions, as found in *Gaines v. New Orleans*, 6 Wall., 642, and in *Gaines v. De la Croix*, id., 719; and in *Gaines v. Hennen*, 24 How., 553 (which last is adopted in the present cases), very little discretion is left to this court. Some questions, however, have been raised, which it is necessary now to determine.

First, the complainant claims a decree not only for the lands of which the several defendants were possessed at the time of filing the bills respectively, but for the proceeds of lands formerly belonging to Daniel Clark, which the defendants had previously possessed and sold before the filing of said bills. She claims to hold the defendants as trustees for her of the lands thus previously disposed of, and elects to receive the purchase money, instead of following the lands themselves.

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This claim, I think, is untenable. The claim of the defendants is adverse to that of the complainant. There is no privity between them. They stand and have always stood at arm's length. The defendants claimed the lands to be theirs by one title; she claimed them to be hers by another. There was no privity or trusteeship between them. Had the defendants, by any fraudulent practice, or by the fraudulent practice of their grantors or predecessors (known to them), procured the legal title to the lands, then they might have been held as trustees, and if they had disposed of the same, especially to innocent purchasers, might have been made to respond for the proceeds thereof. In such case the lands themselves might have been placed beyond the complainant's reach, and the proceeds might have been the only fund to which the complainant could resort. But in the present case the defendants never acquired the title of the complainant, nor legal title at all, but a spurious title; and their conveyance of the lands has transferred no title to the vendees; but the lands still remain subject to the complainant's title and are recoverable by her in whosoever hands they may be. The conveyance thereof by the defendants to third parties has not in the slightest degree had the effect to place any barriers or obstacles in the way of the complainant to their recovery. Her title remains perfect and unimpaired. Had the legal title been transferred, though subject to her right to avoid it, her election to take the proceeds would have confirmed that title in the possessor, and her remedy would have been exhausted. But her election in the present case does not extinguish her title to the lands. Being the legal title, it remains valid; and a further act on her part, by way of release or other conveyance, in addition to the act of election, would be necessary to effectuate justice. And to whom should such release or conveyance be made? The persons that would have been entitled thereto have not been made parties to the suit; and the court does not know who they are, and can give no directions on the subject. And if they had been made parties, the difficulty would not have been surmounted; because they can never be converted into trustees for her by claiming a

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title paramount to hers without any actual fraud on their part.

The cases in which a person entitled to the possession of personal property has been allowed to waive his right to the specific property, or to damages for its detention, and to sue the wrongful appropriator thereof for the price of it, as upon a sale, do not bear upon the point in question. For a recovery either of damages for the detention or of the price as for a sale, changes the title of the property, and is itself an election to have the money instead. And the cases of *Gaines v. Chew*, 2 Howard, 619; *Hallett v. Collins*, 10 id., 174; *Oliver v. Piatt*, 3 id., 333; *Jenkins v. Eldridge*, 3 Story, 181; and the other authorities, relating to real estate, referred to by counsel for the complainant, as far as I have been able to examine them, do not conflict with the views now presented.

The decrees, therefore, should be confined in each case to the lands of which the parties respectively, either by themselves or their tenants, were, or claimed to be, in possession at the time of filing the bill. As to lands which they may have possessed prior to that time, they are only liable for the rents and profits or fruits whilst thus in possession.

In fact the bill is nothing but what is sometimes called an ejectment bill, and this court has jurisdiction of the case only on the ground of discovery, and the complainant should be satisfied to recover what she could have recovered in an action of ejectment, or the equivalent action under the laws of Louisiana.

The next question relates to the accountability of the defendants for the rents and profits or fruits of the lands possessed by them respectively.

The defendants contend that they are not liable for these, because they were possessors in good faith; or if liable at all, they are entitled to compensation for their improvements; and they rely on those provisions of the code which declare:

1. The possessor in good faith is he who has just reason to believe himself the master of the thing which he possesses. Art. 3414.

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2. Every possessor has a right to gather, for his benefit, the fruits of the thing, until it is claimed by the owners, without being bound to account for them, except from the time of the claim for restitution. Art. 3416.

3. He has also the right in case of eviction from the thing reclaimed, to retain it till he is reimbursed the expenses he may have incurred on it. *Id.*

Whatever might be the views of this court on this point, were it open before us for discussion, is of no consequence. It seems to be entirely covered by the judgment of the supreme court.

To understand that judgment, it is necessary to premise that the lands in dispute belonged to Daniel Clark at the time of his death in August 1813 ; that the said Clark left behind him a will dated in 1811, making Richard Relf and Beverley Chew his executors, and Mary Clark, his mother, his general legatee, which will was admitted to probate ; that this was not his last will, but that he made another will shortly before his death, in which he acknowledged the complainant to be his legitimate and only daughter, and made her his universal legatee, giving to his mother an annuity, and to other persons certain legacies, and making Francois Duseau De la Croix, James Pitot and Jos. D. D. Bellechasse, his executors ; that this will was suppressed, and did not, nor did her paternity come to the knowledge of the complainant till about 1834, when she applied for probate of said will, which was at first refused ; that nevertheless, probate was granted in December, 1855 ; and this suit was therefore commenced in December, 1856. That, in the mean time, in or about 1820, Relf and Chew, claiming to act as executors of the will of 1811, and as attorneys of Mary Clark, the legatee under it, but without any authority from the proper court, undertook by action and private sale, to sell the lands of Daniel Clark, and did sell the same to various purchasers, from whom, mediately or immediately, the defendants claim title to the lands. That even after the complainant came of age, and discovered her paternity, and the fact that her father had made the will of 1813, she commenced various suits to recover

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the said lands, both against the city of New Orleans and others, and her claim became universally known.

These suits met with various fortune but finally, in the case of *Gaines v. Hennen*, reported in 24 How., 558, a decree was made in the supreme court of the United States, which has been reaffirmed and adopted by the same court in this case, and which it is necessary to examine in order to understand fully the form and effect of the decree to be entered now. It seems to me that the decree of the supreme court in the case of Hennen thus reaffirmed and adopted in these cases, has fully answered the question as to the claim of good faith on the part of defendants, as bearing both on the matter of rents and profits, and on the matter of reclamation for improvements.

The decree in the Hennen case declares: "That the said Richard Relf and Beverly Chew, at the time and times when, under the pretended authority aforesaid, they caused the property so described and claimed by the defendant, Hennen, to be set up and sold by public auction, on the 19th day of December, 1820, and when they executed their act of sale aforesaid, of the 28th of December, 1820, to the said Azelie Lavigne, had no legal right or authority whatever so to sell and dispose of the same, or in any manner to alienate the same; that the said sale at auction, and the said act of sale to Azelie Lavigne in confirmation thereof, were wholly unauthorized and illegal, and are utterly null and void; and that the defendant Hennen, at the time when he purchased the property so described and claimed by him as aforesaid, was bound to take notice of the circumstances which rendered the actions and doings of the said Beverley Chew and Richard Relf, in the premises, illegal, null and void; and that he, the said Hennen, ought to be deemed and held, and is hereby deemed and held to have purchased the property in question, with full notice that the said sale at auction, under the pretended authority of the said Richard Relf and Beverley Chew, and their said act of sale to said Azelie Lavigne were illegal, null and void, and in fraud of the rights of the person or persons entitled to the succession of the said Daniel Clark." The court further decreed that the complain-

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ant was justly and lawfully entitled to the property claimed and held by Hennen, together with all the yearly rents and profits accruing from the same from the time he went into possession, and they remanded the cause to this court with directions :

1. To cause Hennen to surrender all the property claimed and held by him into the hands of complainant.

2. To cause an account to be taken of the yearly rents and profits accrued and accruing from the property since it came into Hennen's possession, and to be paid to the complainant; such account to be taken subject to the laws of Louisiana in cases of such recovery, as is now decreed in favor of the complainant.

Such was the decree in the Hennen case.

In the case now before us, the supreme court in their opinion, say that the sales made by Relf and Chew (under whose conveyance the defendants claim title), whether made as executors or as attorneys of Mary Clark, were void and conveyed no title (6 Wall., 711 and 712); and after adverting to the fact that the defendants say they are purchasers in good faith for value without notice, or have acquired titles from those who were, add (p. 816): "we cannot see, in view of the discussion already given to this case, how this plea can be true, but as it cannot avail the defendants, if true, it is unnecessary to discuss the evidence further in order to ascertain whether it is true or false. For the question at issue is only on the legal title."

The court further hold that the plea of good faith can only aid the defendants on the plea of prescription. They then add: "But the title of the complainant is not barred by prescription, according to the law of Louisiana. This defense was made in the case of *Gaines v. Hennen*, and disposed of adversely to the defendant, and is no longer an open question in this court. The prescription relied upon by the defendants in this case is the same that was relied upon by the defendant in that, and as the proofs are common to both, it follows, as the plea of prescription was not available in the one, it is not in the other." The court, in conclusion, say: "The questions of law and fact

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applicable to those rights (the rights of the complainant) were determined in the case of *Gaines v. Hennen*. After argument by able counsel, and mature consideration, we have reaffirmed, that decision."

Thus, taking the opinion and decree of the supreme court in the Hennen case, and their opinion in these cases, together, it is very manifest that the supreme court have adjudged against the plea of good faith set up by the defendants.

It is true that, in this case, the court, considering the legal title as the question involved, seem to regard the fact of good faith, except as bearing on the question of prescription, as not material; but they also, in conformity with the views expressed in *Gaines v. Hennen*, say that they do not see how the plea of good faith can be true, and they expressly adopt the decision in that case against the plea of prescription in reference to which they admit that the plea of good faith is pertinent, and I also understand them to adopt the definitive decree made in that case, which awards rents and profits to the complainant and against the defendant.

And this (as we have seen from the Code) could not be done if the defendants were purchasers in good faith.

The whole effect of their decision, therefore, is against the plea of good faith for any purpose whatever.

The judgment is that the titles attempted to be created and passed by Relf and Chew were bad — not only bad, but void — and that the defendants, claiming under and through them, ought to have known it. This judgment we are bound to carry out. We cannot inquire whether it is right or wrong. We are to presume that all the questions involved in it were duly and fully discussed, as we have no doubt they were.

The decrees presented to me seem to be in conformity with the views and mandate of the supreme court except that against the city of New Orleans, which will be so modified as to embrace only the lands which were in possession of the city at the time of filing the bill in this case.

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Blum, Frank & Co. vs. The Caddo.

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NOVEMBER TERM, 1870.

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BLUM, FRANK & CO. VS. THE CADDO.

1. When B., F. & Co., in New Orleans, sold goods to G. D., in Jefferson, Texas, on credit, and charged the price against G. D. on their books, and delivered the goods for transportation to a common carrier, directed to G. D., and consigned to S. & P., at an intermediate port: *Held*, that B., F. & Co. could not maintain an action against the common carrier for the loss of the goods.
2. In such a case the right of stoppage *in transitu* in the vendor does not affect the right of property in the vendee.
3. A vendor in making a contract of affreightment with a common carrier acts as the agent of the vendee, although the vendee may be a stranger to the carrier.

This was an admiralty appeal.

*Mr. Geo. W. Race*, for libellants.

*Mr. R. H. Marr*, for claimants.

WOODS, Circuit Judge, stated the case and delivered the opinion of the court.

The libel alleges, that on or about the 12th of September, 1868, the libellants shipped at New Orleans, on board the steamer Caddo, seven cases and one bale of dry goods to be conveyed to Shreveport, Louisiana, and there delivered to Stacy & Poland, consignees; that the steamer failed to deliver a part of the goods, amounting in value to \$963.74, which sum, together with the freight, insurance and charges upon said goods amounts to \$1,127.54, for which last named sum with interest and costs the libellants ask a decree against the Caddo.

A. A. Barnes and Thomas Knee intervene as sole owners and file an answer.

The proof shows that the goods were sold on credit by the libellants, who were merchants in New Orleans, to G. Dreyfus,

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who was a merchant at Jefferson, Texas, and charged to him on books of libellants. The goods were shipped according to the orders of Dreyfus, marked "G. D., Jefferson, Texas," and consigned to the care of Stacy & Poland of Shreveport, which was an intermediate port. The goods were insured by libellants in the Louisiana Mutual Insurance Company, and the premium charged to Dreyfus. The freight was not paid by libellants but by Stacy & Poland of Shreveport, who were agents of Dreyfus for that purpose and also to receive and forward the goods to Jefferson, Texas.

Upon this state of facts the claimants say that libellants had no property in the goods lost and, therefore, cannot maintain this suit.

The question whether the consignor or consignee has the right of action in cases where goods consigned to a common carrier are lost or damaged has been somewhat unsettled by conflicting decisions both in England and this country.

The decided weight of authorities is now in favor of the proposition that the person having the right of property and the right of possession is the one to sue, whether consignor or consignee. *Tindal v. Taylor*, 28 Eng. L. and Eq., 210; *Potter v. Lansing*, 1 Johns., 214; *Dawes v. Peck*, 8 Term, 330; *Dutton v. Solomonson*, 3 Bosanquet & Puller, 582; *Brown v. Hodson*, 2 Camp., 36; *Ludlow v. Bowne*, 1 Johns., 1; *De Wolf v. N. Y. Fire Ins. Co.*, 20 Johns., 214; *Price v. Powell*, 3 Comstock, 322; *Everett v. Saultus*, 15 Wendell, 474; *Ilseley v. Stubs*, 9 Mass. 65; *The Venus*, 8 Cranch, 252; *The Merrimac*, id., 317; *The Frances*, 9 id., 183; *Brandt v. Bowlby*, 2 Barnwell & Adolphus, 932.

The property in the goods shipped is considered to be *prima facie* in the consignee, and he will be entitled to sue in the absence of proof to the contrary. *Lawrence v. Menturn*, 17 Howard, 100; *Ogden v. Coddington*, 2 E. D. Smith, 317; *Tronson v. Dent*, 36 Eng. L. and Eq., 41; *Coleman v. Lambert*, 5 Mason & Welsby, 502.

In the case of *Evans v. Marlett*, 1 Lord Raymond, 271, it was held:

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"If goods by bill of lading be consigned to A., A. is the owner and must bring action against the master if they are lost. But if the bill be special, to be delivered to A. to the use of B., A. ought always to bring the action for the property is in him, and B. has only a trust *per totam curiam*."

A delivery to an agent for and on behalf of his principal will transfer the property equally with a delivery to the principal himself. This is an elementary rule in the transfer of property, and the master of a vessel is considered the agent of the consignee. Per Kent, C. J., in *Ludlow v. Bowne*, 1 Johns., 15.

So in *Godfrey v. Ferzo*, 3 P. Wms., 185, the like rule was laid down by Chancellor KING, who said, that on the delivery of goods to the master of a ship the property immediately vested in the consignee, who was to run the risk of the voyage.

So in *Snee v. Prescott*, 1 Atk., 248, Lord Chancellor Hardwicke said that if goods are delivered to a carrier to be delivered to A., and they are lost, the consignee only can bring the action, which showed the property to be in him, and he said it was the same when goods were delivered to the master of a vessel, though he allowed at the same time the right of the consignor to stop *in transitu*.

From these authorities, the following principles may be considered as established:

1. That the right to sue is in the person who has the right of possession and the right of property.
2. That *prima facie* the consignee is the owner and entitled to sue.
3. That a delivery of goods to the common carrier is a delivery to the consignee.
4. That when the consignee is the owner or agent of the owner he and not the consignor must sue.

In the case on trial the proof shows that the goods were sold by libellants to Dreyfus and their value charged to him on their books. They were delivered to the carrier, marked with the initials of Dreyfus and with the place of his residence, Jefferson, Texas, and consigned to Stacy & Poland at Shreveport, an

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intermediate port. They were insured by libellants, but the premium paid was charged by them to Dreyfus.

It seems to me there is nothing wanting to a complete transfer of the property from libellants to their vendee. Here is a sale, a delivery to the common carrier, the agent of the vendee, and the goods are shipped at the risk of vendee. The only right in the goods left in libellants, after their delivery to the common carrier, is the right of stoppage *in transitu*.

The effect of this right upon the question under discussion is stated by Kent, C. J., in *Ludlow v. Bowne*, 1 Johns., *supra*, as follows:

"The right of stoppage *in transitu*, as between vendor and vendee, came from the court of equity. The first case in the books is that of *Wiseman v. Vandeputt*, 2 Ver., 208, in chancery. On the first hearing the chancellor ordered an action of trover to be brought to try whether the consignment vested the property in the consignee, and it was then determined in a court of law that it did. But equity thought it right to interpose and give relief, and since that time this new rule of stoppage *in transitu* has been admitted in courts of law as well as equity, between consignor and consignee, in case of insolvency of the latter and before actual delivery. This rule is not considered however as altering the right of property which, by the old rule of law, vested in the consignee upon delivery to the carrier, for him and at his risk. The delivery to the carrier," the C. J. goes on to say, "is a constructive delivery to the vendee and the goods are considered in the possession of the vendee the instant they pass out of the possession of the vendor, to every other purpose but that of defeating the equitable right of reclaiming the property upon the insolvency of the vendee."

The same doctrine is fully recognized in *Cox v. Harden*, 4 East., 211, in which the court says that "a delivery to the master of a general ship, under a consignment, is a delivery to those to whom and for whose use the goods were sent, and at whose risk they were during the passage; and that the property was subject only to be diverted by the shippers' right of

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Hewett, Ex'r, vs. Norton, Assignee.

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stoppage *in transitu*, which was deemed a species of *jus postliminii*."

See also Hardwicke, Chancellor, in *Snee v. Prescott*, 1 Atkins, *supra*.

So we may consider it settled that the right of stoppage *in transitu* remaining in the vendor does not affect the right of property in the vendee.

The title to the property remains in the vendee until divested by the exercise of the right of stoppage *in transitu*.

But libellants claim that they are the proper parties to sue because they made the contract of affreightment with the common carrier, to whom the vendee was a stranger and who entered into no contract with the carrier.

But it has been repeatedly held that the vendor in making the contract with the carrier acts merely as the agent of the vendee.

*Dawes v. Peck*, 8 Term, 330; *Coats v. Chaplin*, 2 G. & D., 552; *Dunlop v. Lambert*, 6 Clark & F., 600.

I am of opinion on the authorities cited that the libellants have not the right to sue under the facts in this case, and while according to some of the authorities, the suit should have been brought by Stacy & Poland, and according to others by Dreyfus, the owner; yet the great weight of authority is that the right of action is in one or the other of them and not in the libellants.

The libel must therefore be dismissed at costs of libellants.  
Decree accordingly.

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HEWETT, Ex'r, vs. NORTON, Assignee.

1. A suit commenced in a state court before bankruptcy, in which the title to the property surrendered by the bankrupt is in controversy, will not be abated by the bankrupt proceedings.
2. A state court cannot, by its process, take property surrendered by a bankrupt, from the possession of the assignee in bankruptcy.

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Hewett, Executor, vs. Norton, Assignee.

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This is a petition addressed to the supervisory jurisdiction of the circuit court, under section 2 of the bankrupt act, to review an order of the district court sitting in bankruptcy.

*Mr. Edward Phillips*, for petitioner.

*Mr. R. H. Marr*, for defendant.

WOODS, Circuit Judge. Zebulon York and Elias J. Hoover were, by the last will of Jacob Hoover, dated Jan. 28, 1859, made his executors and universal legatees. Jacob Hoover died on the 27th day of August, 1859, in the parish of Concordia, in the state of Louisiana, and said York and Hoover by virtue of said will, took possession of his estate, both real and personal, claiming title thereto under the will.

On the 13th of December, 1859, the heirs of Jacob Hoover, deceased, filed in the district court of Concordia parish, their petition against York and Hoover, alleging that said paper writing purporting to be the last will of Jacob Hoover, was not his last will, praying that the same and the probate thereof might be set aside and avoided, and for an account, and pending this suit, to wit, in March, 1869, York and Hoover filed their petition in bankruptcy, in the United States district court of Louisiana, were adjudged bankrupts and surrendered to E. E. Norton, their assignee, certain plantations and other property which they claimed under the will of Jacob Hoover.

On or about the 13th of October, 1869, the petitioners in said action to set aside the will of Jacob Hoover filed an amended petition, in which they set out new grounds for avoiding the will of Jacob Hoover, and prayed that a writ of sequestration might issue to the coroner of Concordia parish, directing him to take possession of said property so surrendered by York and Hoover to Norton, their assignee. The district court of Concordia parish, on a hearing of this amended petition at chambers, on the 5th of November, 1869, ordered the writ of sequestration to issue as prayed for.

On the 13th of June, 1870, Norton, as assignee of York and Hoover, applied by petition to the U. S. district court, for an

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Hewett, Executor, vs. Norton, Assignee.

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order enjoining and restraining the petitioners in the suit pending in the district court of Concordia parish, from any further proceedings therein. Such an order was made by the U. S. district court, sitting in bankruptcy, and it is to review and reverse such order that this petition is addressed to the circuit court.

The case presents two questions :

1. Whether the suit in the Concordia district court to try the title to the property surrendered by York and Hoover, by an attack on the will of Jacob Hoover, ought to be allowed to proceed ; and

2. Whether that court ought to be allowed, by a writ of sequestration pending the trial of the title to the property, to take the property out of the possession of the assignee in bankruptcy.

Of these in their order. I think the first question is settled by the 25th and 14th sections of the bankrupt act.

The 25th section provides, that whenever it shall appear to the satisfaction of the court that the title to any portion of an estate, real or personal, which has come into the possession of an assignee is in dispute, the court may order it to be sold under the direction of the assignee, who shall hold the funds received in the place of the estate disposed of. And the proceeds of the sale shall be considered the measure of the value of the property in any suit or controversy between the parties *in any court*, but this provision shall not prevent the recovery of the property from the possession of the assignee by any proper action commenced at any time before the court orders a sale.

It seems clear from these provisions that it is not the purpose of the bankrupt act to abate suits commenced before bankruptcy, in which the title to the property surrendered by the bankrupt is in litigation. This view is strengthened by the provisions of the 14th section, to the effect that the assignee may prosecute and defend all suits at law or in equity pending at the time of the adjudication of bankruptcy in which the bankrupt is a party in his own name, in the same

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manner and with the like effect as they might have been prosecuted or defended by such bankrupt.

The provisions of this section include suits and actions pending in the state courts and are addressed to the courts in which such suits or actions are pending, quite as much as to the federal courts. The state courts having jurisdiction of the parties and subject matter, must determine the questions as they arise, according to law, subject to the final judgment of the proper appellate tribunal. *In re Clark et al.*, 3 Bankrupt Reg., 128; *Samson v. Burton*, 4 id., 1.

I am unable to arrive at the conclusion, as I must do if I affirm the order of the district court, that upon the filing of a petition in bankruptcy, all suits pending in the state courts in which the bankrupt is a party abate, and that new actions must be brought in the bankrupt court, either by or against the assignee.

I am of opinion, therefore, that the injunction allowed by the district court, so far as it operated to restrain the parties from proceedings in this suit in the district court of Concordia parish, to try the title to the property surrendered by York and Hoover, was improvidently granted.

Upon the second question raised by the petition of review, I am quite as clear that the action of the district court in restraining the parties from proceeding to take the property out of the possession of the assignee in bankruptcy, by a writ of sequestration issued from the state courts, was right and ought to be affirmed.

When York and Hoover filed their petition in bankruptcy, they had the apparent legal title to the property in controversy, and were in possession. They surrendered the title to the property and the possession to their assignee.

As soon as a petition in bankruptcy is filed, the property of the insolvent is thereby brought *eo instanti* into the bankrupt court and placed in its custody, and no other court and no person acting under any process from any other court can, without the permission of the bankrupt court, interfere with it, and to so interfere is a contempt of the bankrupt court. See Bump on

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Bankruptcy, ed. of 1871, p. 245, and numerous cases there cited.

In order to recover property from the possession of the assignee in any court, it must by proper action commenced before the bankrupt court orders a sale of the property. *Bank. Act*, sec. 25.

The proceeding to sequester the property surrendered by York and Hoover, was not commenced until the 13th day of October, 1869, long after the bankrupt court had ordered a sale, and the property had been put up to sale and bid off. Even if such proceedings could be permitted to a state court, they came too late.

In accordance with these views, it is decreed that so much of the decree of the district court as authorizes the injunction to restrain the petitioners from proceeding in the action in the state court be set aside, and so much as authorizes an injunction restraining the petitioners from proceeding under the writ of sequestration be affirmed. And it is ordered that the injunction be modified accordingly.

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**THE INSURANCE COMPANY VS. THE "C. D., JR."**

1. A corporate body created by the laws of one state may maintain an action in the state or federal courts of another state.
2. Where insured property was committed to the custody of a common carrier for transportation, and was lost, and the insurance company paid the owner the value of the property; *held*, that the insurance company could maintain an action against the carrier, although it was not legally bound to indemnify the insured for the loss.

**ADMIRALTY** appeal.

*Messrs. Jos. P. Horner and W. S. Benedict*, for libellant.

*Mr. M. Grivot*, for claimant.

WOODS, Circuit Judge. On the 28th of November, 1858,

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between two and three o'clock in the morning, a flatboat called the Delta, loaded with machinery and castings for a sawmill and draining machine, and lying moored to the bank of the Mississippi river, about four miles above Donaldsonville, was run into and sunk by the steamer "C. D., Jr.," and a large portion of her cargo was carried to the bottom of the river.

The machinery on board the flat was the property of the "Niles Works," in Cincinnati, and was insured in the Commercial Insurance Company, of Cincinnati. The insurance company paid to the Niles Works the amount of the loss occasioned by the collision, and now brings this suit to recover the sum so paid, from the "C. D., Jr.," and her owners.

The answer of respondents raises two preliminary questions which demand our attention.

It is claimed that the libellant, being a corporate body created by the laws of the state of Ohio, cannot bring suit outside the limits of that state.

This position is not tenable. An incorporated company has only to show that it has been regularly and effectually made a corporate body to enable it to sustain a suit beyond the jurisdiction within which it was constituted. Thus in the case of the Dutch West India Company, it was long since decided in England, both in the King's Bench and Common Pleas, that a Dutch corporation might sue in England, though the objection was made that it could not maintain a suit on account of its foreign charter. *Dutch West India Co. v. Henriques Van Moyses*, 2 Lord Raymond, 1535. Since this case, it has been decided that a foreign corporation may maintain an action of assumpsit in England. Chitty on Contracts, 11th Am. ed., 383.

Indeed after it has been proved, like any other matter of fact, that an association of persons who bring a suit in any foreign court, by a corporate name, have been incorporated, there is no more reason why their suit should not be sustained, than there is why the suit of a natural individual who is a foreigner should not be. Angell & Ames on Corporations, 8th ed., sec. 372.

Every argument in favor of entertaining in American courts suits by corporations created by the laws of a country not form-

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ing a part of the American union, applies with still greater force to corporations of the states composing the union.

In the *Bank of Marietta v. Pindall et al.*, 2 Randolph, 465, Judge CABELL said respecting the power of a corporation, created by the laws of a state, to sue in another state, that "it is rendered doubly necessary by the intimacy of our political union, and by the freedom and frequency of our commercial intercourse."

So in the *Portsmouth Livery Company v. Watson*, 10 Mass., 91, where the plaintiff was a company not incorporated by the law of Massachusetts, and when it was said that the damages should have been demanded in the name of all the persons constituting said company, suing in their private and individual capacities, the court replied that "the principle suggested by the plea has no foundation in any maxim or in any argument of public convenience or policy. Corporations are artificial persons, and their existence and rights are to be proved, whether the result of a public or private statute, domestic or foreign, as any other fact of that nature is proved. The powers of corporations to sue a personal action in this state are not restricted to corporations created by the laws of this commonwealth."

The same doctrine is announced by Chancellor KENT, in *Silver Lake Bank v. North*, 4 Johns. Ch., 370. See also *President of Lombard Bank v. Thorp*, 6 Cowen, 46; *Hartford Bank v. Burry*, 17 Mass., 97, and *Williamson v. Smoot*, 7 Martin, 31.

In the case of the *Bank of the United States v. Deveaux et al.*, 5 Cranch., 61, TANEY, C. J., held that a corporation aggregate might sue in the courts of the United States, when the persons composing said corporation were citizens of a different state from the opposite party.

But in the case of the *Louisville, Cincinnati & Charleston Railroad Co. v. Letson*, 2 How., 497, the supreme court overruled so much of this opinion as authorized a corporation to plead in abatement that one or more of the corporators, plaintiffs or defendants, were citizens of a different state from the one described, and held that the members of the corporate body must

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**Steamer Saratoga vs. 488 Bales of Cotton.**

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be presumed to be citizens of the state in which the corporation was domiciled, and that both parties were estopped from denying it.

So we may consider it as the settled law, that a corporation may maintain a suit in either the state or federal courts outside the limits of the state by whose laws it was created.

Respondents further claim that having shown by the testimony, as they allege, that the insurance company was not legally bound to indemnify the insured for the loss the latter sustained by the collision, therefore the libellants have no cause of action against respondents, although they have paid the loss.

But I am of opinion that the authorities are adverse to this claim, and adopt the conclusion of the district judge, and refer to the case of *Monticello v. Mollison*, 17 Howard, 152.

On the merits of the case, I think the right of libellants to recover is clearly established. I am also satisfied from the testimony, that the amount of damage, as found by the commissioner, is correct.

A decree in favor of the libellants will be entered accordingly.

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**STEAMER SARATOGA VS. 488 BALES OF COTTON.**

1. Where a treasury agent seized a lot of cotton as captured or abandoned property, and the same was transported to New Orleans: *Held*, that the claimant of the cotton could not be required to pay the freight and charges on the same if the cotton was taken from his possession against his will and was not in fact captured or abandoned.
2. In the admiralty an appeal supersedes altogether the decree of the court below, and the case is to be tried in the appellate court as if no decree had been passed in the court from which the appeal is taken.
3. Where the libellant claimed \$27,000 and got a decree for \$900 in the district court, and appealed, the circuit court being of opinion that the libellant ought to recover nothing, could dismiss the libel at libellant's costs, although no appeal had been taken by claimant from the decree of the district court.

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**Steamer Saratoga vs. 438 Bales of Cotton.**

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This was an Admiralty Appeal.

The case was this: The cotton was on the plantation of W. H. Gill, the claimant, in Red River county, Texas, who had an agent employed to guard it. In March, 1866, one Turnbull an agent of the treasury, had the cotton seized as captured or abandoned property and, against the protest of Gill, conveyed in wagons to Shreveport, Texas, and there stored. In April the master of the steamer Saratoga, against the express wishes of Gill, paid the charges on the cotton for transportation to Shreveport and for storage there, amounting to \$26,052.97, and took the cotton on board the steamer and conveyed it to New Orleans. The freight from Shreveport to New Orleans amounted to \$1,095. Gill followed the cotton to New Orleans and recovered it.

The owners of the Saratoga, however, filed this libel against the cotton, seeking a lien for the charges paid by them upon the cotton, and for the freight from Shreveport to New Orleans.

*Messrs. E. C. Billings and R. DeGray*, for libellant.

*Mr. S. R. Walker*, for claimant.

WOODS, Circuit Judge. The claimant by way of defense to the libel, answers:

1. That the cotton was shipped without his consent, but when he learned he could not prevent its shipment, he consented that it might be shipped, provided libellants would not pay the charges claimed thereon.

2. That the charges claimed to have been advanced, if they were in fact advanced, were incurred without the knowledge or consent of claimant.

3. That the cotton was forcibly and illegally and without consent of claimant, taken from the possession and plantation of claimant, in Red River county, Texas, and removed to Shreveport, La.

4. That libellants was notified by claimant before paying said charges that the cotton belonged to claimant, and not to pay the charges thereon because they were illegal and exorbit-

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ant, and was informed how the cotton was taken from claimant's possession.

The proof clearly establishes these facts: that the cotton claimed by Gill was his property, that it was taken forcibly and without his consent, and transported to Shreveport. There is an utter failure to show that the cotton was or ever had been in any manner or form the property of the Confederate States.

It is difficult to see how one man can enter upon the premises of another, carry off his property against his will by force, and subject it to charges for carriage or storage, which the owner is compelled to pay.

But it is claimed for libellants, that this property was seized by Turnbull, as treasury agent, under authority of section 1 of the act of March 12, 1863 (12 stat., 820), and conveyed to Shreveport and thence to New Orleans by virtue of the 2d section of said act. The first section provides that the special agents of the treasury department shall receive and collect all abandoned or captured property, in any state or territory or any portion thereof, designated as in insurrection. Section 2 provides that the property so received and collected shall be forwarded to such place within the loyal states as the public interest may require.

To authorize the seizure or transportation of this property by the agent of the treasury it must have been either abandoned or captured. This property was not abandoned, for it was on the premises of the owner, who was then present either by his agent or in person, claiming the property and protesting against its seizure or removal.

It was not captured unless taken *flagrante bello* or surrendered as the property of the Confederate States at the close of the war. There is no proof that it ever was so captured or surrendered.

We find, therefore, that after the actual close of the war, after hostilities had for sometime ceased, this property of the private citizen was taken forcibly from his possession, against his will, by a person having no claim, or color of a claim, to it; and who, to state his character in the mildest words the transaction

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will admit, was a naked trespasser. Such a trespasser could no more subject property to charges which the owner would be under obligation to pay, than if he had stolen it. The charges which the owner, when following up his property, can be required to pay, are such and such only, as he has agreed to pay.

I am unable to find any competent proof in this record to establish the promise of the claimant to pay either charges or freight. Gill, in his deposition, denies that he made any promise to pay the freight. In his answer he says he did not wish to ship his cotton on the Saratoga, but finding that he could not prevent the shipping of it on the Saratoga, he consented that libellants should take the same, provided they would not pay the charges claimed thereon. He consented, therefore, on condition. That condition, if what libellants assert is true, was broken. They say they did pay these charges; they are now suing for their recovery. How then can Gill be held to his implied promise to pay freight, when the terms on which the promise was to be binding have not been kept?

It is claimed that there is proof to show that Gill agreed to pay the warehouse charges of Griffin & Co., at Shreveport, amounting to \$3,000. The only proof upon this point is found in the testimony of R. A. Phelps, who professes to give the contents of a letter from Gill to Dowty, master of the Saratoga, from which the promise may be implied. The letter is not produced, nor is any foundation laid for secondary evidence of its contents. The testimony was objected to. It is clearly incompetent, and the objection is sustained. This leaves the libellant without any proof whatever of a promise by Gill to pay any of these charges or freight.

Without such promise there is no reason in law or equity why Gill should be required to pay any expenses incurred in transporting his cotton to New Orleans. It turns out that the wrong doers carried his property to a place where Gill could sell it to advantage. That is his good fortune. But suppose they had conveyed this cotton to some point where cotton was

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of no value, where there was no market, with what face could they ask him, on the recovery of his property, to pay the expenses incurred by them in the running away with it? Their right to do so would be just as clear in that case as this.

I am satisfied from an inspection of this record, that the cotton of claimant was not seized in good faith by the treasury agents. It was an attempt but too common in those times to take the property of the citizen, under the pretext of seizing it as government property, in order that it might be bought at a price below its real value. The persons engaged in this enterprise failed. They cannot charge the expenses of their unlawful acts upon the owner of the property, nor can any one who pays such expenses, either with or without notice of their unjust and unlawful character, be allowed to recover them of the owner of the property.

This libel must be dismissed at the costs of libellant.

The court having rendered this decision, proctors for libellants stated, that the district court had rendered a decree in favor of libellants for \$900 and costs of suit, that libellants only appealed from this decree, and the claimant not having appealed, the decree of the district court for \$900 in favor of libellants must stand, and this court could not interfere with it.

WOODS, Circuit Judge. I think otherwise. When libellants appealed, the appeal opened the whole case. They cannot be allowed to claim the benefit of the decree below, and standing secure on that, try their fortunes in this court.

In admiralty cases an appeal suspends the decree altogether. It is not *res adjudicata* until the final sentence of the appellate court is pronounced. *The Roarer*, 1 Bl., C. C. 1; *Yeaton v. The United States*, 5 Cranch, 281. The cause in the appellate court is to be heard *de novo* as if no decree had been passed. We do not find these views opposed to the authorities cited by libellants. In fact, those authorities do not seem to touch the question at all.

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**Citizens' Bank vs. Ober.**

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The libel, therefore, must be dismissed at the costs of the libellant.

Decree accordingly.

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**CITIZENS' BANK VS. OBER.**

1. A person who intends to bid at a cash sale of a bankrupt's estate, may agree, in case he becomes the purchaser, to sell to another person at a fixed price on terms of credit, when he has no notice that such second person has any purpose to bid at the sale, or has the means to make his bid good. Such an agreement will not avoid the sale.
2. A sale of a bankrupt's estate made to a solicitor of the assignee, retained generally in the bankruptcy, will be set aside as against public policy.

This was a petition addressed to the supervisory jurisdiction of the circuit court, under the second section of the bankrupt act. Certain property of York & Hoover, the bankrupts, having been sold and the sale confirmed by the district court, sitting in bankruptcy, this petition was filed to reverse the decree confirming the sale.

*Messrs. Wm. M. Randolph and H. M. Hyams*, for petitioner.  
*Mr. John A. Campbell*, for Ober.

WOODS, Circuit Judge. It appears from the record that on the 16th day of February, 1869, two plantations called respectively, "White Hall" and "Home," the property of the bankrupts, were sold at public sale by the assignee to Albert G. Ober, of the firm of Ober, Atwater & Co., said firm being among the mortgage creditors of the bankrupts.

The motion to confirm the sale in the bankrupt court was resisted on the ground that the purchaser had used illegal and improper influences to deter other persons from bidding, and that the purchase was made by Ober for and in behalf of Norton, the assignee, and that Norton was in fact the purchaser.

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The district court referred the question of the fairness and validity of the sale to a commissioner, who reported in favor of the fairness and *bona fides* of the sale.

The district court, after argument, confirmed the report of the commissioner, and it is to reverse this order that the present petition was filed.

The testimony taken by the commissioner establishes conclusively that the assignee was not a party directly or indirectly to the purchase, nor interested therein in any manner or degree; that so far as he was concerned, the sale was conducted fairly and according to law; and the objection that he was interested in the purchase appears to have been abandoned.

Relative to the averment that Ober, Atwater & Co. had used illegal and improper influences to deter other persons from bidding, the following facts are established: John S. Scott, about an hour previous to the sale, proposed to Ober, Atwater & Co. that in case they became the purchasers of the "Home" place, he and his friends, whom he represented, would buy the place of them for the price of \$35,000, of which \$20,000 was to be paid in cash, and the residue, \$15,000, in October following the sale. Ober, Atwater & Co. gave Scott the impression that they would sell to him at the price and upon the terms named; but Scott did not inform them that he intended to bid at the sale, nor that he was prepared to pay cash for the property. Scott, who made this arrangement, was ready to bid \$35,000 and had the means of his friends at his command to make his bid good. He testifies that he refrained from bidding on account of the arrangement which he supposed he had made to purchase from Ober, Atwater & Co.

It is further shown that H. D. Stone, Esq., was the solicitor of the assignee of York & Hoover in the matter of their bankruptcy. That about an hour before the sale, Ober, Atwater & Co., at the suggestion of Stone, made to him the following proposition in writing, the handwriting of the body of the paper being Stone's:

NEW ORLEANS, LA., FEB. 16.

H. D. STONE:— We will sell you White Hall plantation for

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\$20,000 at any time after we purchase it. But you shall not be obliged to take it till our mortgage thereon is judicially determined to be valid as a first mortgage; or you may have one-half of White Hall and Home place for \$22,500 at any time, but you shall not be obliged to take it until it is judicially determined that we have a first mortgage upon both places. For value received, we agree to carry out the above proposition in good faith.

OBER, ATWATER & CO.

Ober, of the firm of Ober, Atwater & Co., became the purchaser at the sale of both places; of the Home at the price of \$19,800, and of White Hall at \$22,000.

These are substantially the facts as shown by the evidence.

In regard to the arrangement with Scott, standing alone, I cannot go the length to say that it is sufficient to avoid the sale. In my opinion it is permitted to a party who expects to bid at a sale, when the terms are cash on the day of sale for the whole amount of the purchase price, to agree with another party that in case he becomes the purchaser, he will sell the property to him at a named price on terms of credit. This is clearly so when the person proposing to purchase has no knowledge or notice that the party proposing to buy is prepared to pay cash, and is ready to bid, and able to make his bid good. The proposition for a credit for a part of the purchase money is a strong indication that the party making the proposition is not able to buy at the sale and pay cash, and may well be taken by the person to whom the proposition is made as an admission to that effect. *Phippen v. Stickney*, 3 Met., 334; *Small v. Jones*, 1 Watts & Serg., 128.

In regard to the proposition made to Stone, it is admitted by counsel for Ober, Atwater & Co., that the assignee could not purchase at his own sale, nor, under the bankrupt law and practice in England, could his solicitor, because, there, the solicitor of the assignee is chosen by the creditors. But, under our law and practice, it is claimed the rule is different, because here the assignee is allowed to choose his own solicitor, without regard to the wishes of the creditors. I do not see how the method, by which the solicitor is selected, can change the rule.

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The assignee represents all the creditors. It is his duty so to administer the estate as to produce the best dividends, and so to distribute it as that each creditor shall receive his just rights. To enable him to discharge these duties, the law allows him the assistance of counsel and authorizes payment to his counsel out of the assets of the estate. The solicitor is not the personal counsel of the assignee, but of the assignee as the representative of the creditors. His fees are paid, not by the assignee, but in effect by the creditors. His first duty is to the estate. It is therefore his duty, when he is retained generally in the bankruptcy, to assist the assignee in the interest of all the creditors — to aid him in the collection and just and equitable distribution of the assets, and, if possible, to allow no creditor to obtain an unfair advantage over others. *In re Malory*, 4 B. R., 38.

With these obligations resting upon him, it is difficult to see why the solicitor should be allowed to purchase at an assignee's sale when the assignee is not. When he becomes a purchaser his interest is to buy at as low a price as he can; his duty as solicitor to the assignee is so to advise his client that the property sold may bring the highest price; so that if he is both purchaser and solicitor, his interest is in conflict with his duty.

Judicial and bankrupt sales ought to be protected by the application of such general rules as to insure the utmost fairness and good faith, and to remove far from those whose duty it is to conduct them or who are in any way officially connected with them, any temptation to fraudulent or unfair practices.

If the sale was made to Stone, either directly or indirectly, or if the arrangement made with him was for the purpose of suppressing bidding at the sale, and had that effect; in either case, I should not hesitate to set the sale aside as void.

It was not a direct sale to Stone. Was it an indirect one? It is not pretended that Ober, Atwater & Co. bid for Stone; they bid for themselves, expected to pay, and did pay their own money on their bid. They did not agree to let Stone have the property at what they bid for it. The arrangement was that he was to take it at a price fixed between them in advance, and

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without any reference to the amount at which they bought. It was nothing more than an agreement to sell to him at a fixed price, should they become the purchasers. It was not therefore an arrangement for an indirect purchase by Stone at the assignee's sale, but a contract to buy from a purchaser on an entirely different consideration.

Did it have a tendency to suppress bidding at the sale? Stone swears that he had no intention of bidding, and in this he is uncontradicted. There is no evidence to show that Ober, Atwater & Co. had any suspicion that Stone's purpose was to bid. It did not have the effect to restrain bidding on the part of Ober, Atwater & Co., for it was their interest, with or without the bargain with Stone, to get the property at as low a price as possible.

Norton, the assignee, was in utter ignorance of the contract. So was the auctioneer. Stone did not advise about or interfere with the sale. It was conducted fairly, according to law. The understanding with Stone did not have the effect to suppress competition; was, in all probability, not made for that purpose. Stone did not buy, directly or indirectly, at the assignee's sale. Ought the sale to be declared void by reason of his understanding with Ober, Atwater & Co. I think not. The case is in precisely the same plight as if Stone had made an illegal contract with Ober, Atwater & Co., about some matter entirely disconnected with the sale. After a careful consideration of this case, I am unable to say that the understanding of Ober, Atwater & Co., with either Scott or Stone was such as to render the sale fraudulent or against public policy.

The district court was therefore right in confirming the sale.

The petition to reverse its decree must therefore be dismissed at costs of petitioner.

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The Insurance Company vs. The City of New Orleans.

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THE INSURANCE COMPANY VS. THE CITY OF NEW ORLEANS.

1. An incorporated company is not a *citizen of the United States*, or a *person* within the meaning of the first section of the fourteenth amendment to the constitution of the United States.
2. Following the construction of the supreme court of Louisiana it is held that a law imposing a higher tax upon a foreign corporation doing business within the state, than upon a domestic corporation, is not in violation of the state constitution, which declares that "taxation shall be equal and uniform throughout the state."
3. The proviso in the revenue act, passed by the legislature of Louisiana March 16, 1870, that "no insurance company whose license tax shall be one thousand dollars, shall be liable to any assessment throughout the state other than that imposed by this article," applies only to taxes levied by the state, and does not prohibit taxation of such company by the city of New Orleans.
4. The state of Louisiana conferred upon the city of New Orleans the power to levy a license tax upon trades, professions and callings. Under this authority, *held*, that the city might levy a tax upon foreign corporations double that levied upon domestic corporations, and that such a discrimination was not so unreasonable as to render the tax void.

This cause was submitted on the motion of complainant for an injunction.

*Messrs. James B. Eustis and Robert Hutchinson*, for complainant.  
*Mr. Geo. S. Lacey*, City Attorney, for defendant.

WOODS, Circuit Judge. The bill alleges in substance that complainant is a corporation, created by the laws of the state of New York, and having its principal place of business in that state, but also through its agents, James Picton and Charles S. Goode, doing business in the city of New Orleans, and state of Louisiana, and that the city of New Orleans is a municipal corporation created by the laws of the state of Louisiana.

That said city, on the 6th day of December, 1870, passed an ordinance for the purpose of levying a license tax on persons pursuing any trade, calling or profession in said city, by which foreign life and accident insurance companies are required to pay a license tax of five hundred dollars, and home companies a license tax of two hundred and fifty dollars.

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That the ordinance imposing said tax is in violation of the 14th amendment to the constitution of the United States, because it assesses an unequal tax upon the complainant, and for the same reason, is in violation of the constitution of the state of Louisiana, which requires taxation to be equal and uniform.

That the city of New Orleans had no right or power to levy said tax upon complainant, because the state of Louisiana, by an act of its general assembly, approved March 16, 1870, section 3, article 15, provided that "no insurance company whose license tax should be one thousand dollars, should be liable to any assessment throughout the state other than that imposed by said article;" that complainant has paid a license tax of one thousand dollars to the state of Louisiana for the year 1871, and no other or further license tax can be imposed by state or municipal authority.

Finally, that the city of New Orleans had no right to discriminate in the matter of taxation against complainant, which is a right belonging to the state, if it exists at all.

The bill further alleges that John S. Walton, who is charged with the administration of the finances of the city, is about to enforce the collection of said tax from complainant, and prays that said Walton and Benjamin F. Flanders, the mayor of said city, may be enjoined from the collection thereof, or any portion thereof, and for general relief.

Instead of demurring to the bill, The City of New Orleans, defendant, files an answer which admits substantially the facts alleged in the bill, but takes issue on the conclusions of law deduced therefrom.

The case is submitted on motion for the allowance of the injunction prayed for by the bill.

The first question presented for adjudication is: Admitting the tax to be unequal, is the ordinance providing for its levy and enforcement in violation of the 1st section of the 14th amendment to the constitution of the United States, especially the last clause of the section? The section reads as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States

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and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The complainant, to be entitled to the protection of this constitutional provision, must be either a citizen of the United States or a person in the sense in which that term is used in this section.

It has been repeatedly held, by the supreme court of the United States, that corporations were not citizens of the several states in such sense as to bring them within the protection of that clause in the constitution of the United States (section 2, article IV), which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states;" *Bank of Augusta v. Earle*, 13 Peters, 586; *Paul v. Virginia*, 8 Wallace, 177.

Are corporations citizens of the United States within the meaning of the constitutional provision now under consideration? It is claimed in argument that, before the adoption of the 14th amendment, to be a citizen of the United States, it was necessary to become a citizen of one of the states, but that since the 14th amendment this is reversed, and that citizenship in a state is the result and consequence of the condition of citizenship of the United States.

Admitting this view to be correct, we do not see its bearing upon the question in issue. Who are citizens of the United States, within the meaning of the 14th amendment, we think is clearly settled by the terms of the amendment itself. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." No words could make it clearer that citizens of the United States, within the meaning of this article, must be natural, and not artificial persons; for a corporation cannot be said to be born, nor can it be naturalized. I am clear, therefore, that a corporate body is not a

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citizen of the United States as that term is used in the 14th amendment.

Are corporations persons within the meaning of the same amendment?

The word *person* occurs three times in the first section, in the following connections: "All *persons* born or naturalized in the United States" — "nor shall any state deprive any *person* of life, liberty or property," etc. — "nor" shall any state "deny to any *person* within its jurisdiction the equal protection of the laws." The complainants claim that this last clause applies to corporations — artificial persons.

Only natural persons can be born or naturalized; only natural persons can be deprived of life or liberty; so that it is clear that artificial persons are excluded from the provisions of the first two clauses just quoted. If we adopt the construction claimed by complainants, we must hold that the word "person," where it occurs the third time in this section, has a wider and more comprehensive meaning than in the other clauses of the section where it occurs. This would be a construction for which we find no warrant in the rules of interpretation. The plain and evident meaning of the section is, that the persons to whom the equal protection of the law is secured are persons born or naturalized or endowed with life and liberty, and consequently natural and not artificial persons.

This construction of the section is strengthened by the history of the submission by congress, and the adoption by the states of the 14th amendment, so fresh in all minds as to need no rehearsal.

We are of opinion, therefore, that the ordinance of the city of New Orleans is not in violation of the provisions of the 14th amendment to the constitution of the United States.

But complainants assert that the tax imposed is not an equal tax, and is therefore forbidden by the constitution of the state of Louisiana, article 123 of which says "taxation shall be equal and uniform throughout the state."

Is the tax imposed on the complainant an unequal tax within the meaning of the constitution of the state of Louisiana?

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This precise question has been passed upon by the supreme court of Louisiana in the case of *The State v. Lathrop*, 10 Annual, 402. In that case the court say: "This is a suit for \$1,000 tax on a foreign insurance company not chartered in this state, but transacting business therein. The tax is imposed under an act of the legislature, approved April 30, 1853. It is resisted on the ground that the same statute imposes a tax of but five hundred dollars upon an insurance company incorporated by the laws of the state, and transacting business therein. The defendant contends that the distinction made between these two classes of cases is in violation of article 123 of the state constitution, which declares that "taxation shall be equal and uniform throughout the state."

"The provision of the constitution relied on by the defendant has not deprived the legislature of the power of dividing the objects of legislation into classes. It merely obliges the legislature to impose an equal burden upon all those who find themselves in the same class. Now the class of insurance offices liable to the one thousand dollar tax under the statute in question is entirely different from that which is liable to the five hundred dollar tax."

"It is a mere confusion of ideas to put these foreign corporations on the same footing with corporations which are the creatures of our own state laws from the simple fact of their being alike corporations. It is equally unsound to claim for them the personal and constitutional rights of the citizens of the several states throughout the union. Judgment affirmed with costs."

To precisely the same effect is the case of *The State of Louisiana v. Fosdick*, 21 Annual, 434.

These decisions settle conclusively the point under discussion against the complainant.

But complainant bases his prayer for relief upon the further ground, that the state revenue law, approved March 16, 1870, sec. 3, article 15, which declares that no insurance company whose license tax shall be one thousand dollars shall be liable to any assessment throughout the state other than that imposed

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by that article, is a contract on the part of the state with the insurance companies, to the effect that on the payment of a license tax of one thousand dollars for the year 1871, the insurance companies should be for that year excepted from all other license tax, state, municipal and parochial, and the complainant having paid one thousand dollars for license tax for the year 1871, cannot be further assessed by the city of New Orleans for that year.

If the construction given to the revenue law of 1870, by the complainants, is the correct one, then whether it is considered to be a contract or not, it must control and limit the taxing power of the municipal corporations in the state.

The question is therefore presented, did the legislature intend by the revenue act of March 16, 1870, to relieve foreign insurance companies from all other license tax on the payment to the state of a license tax of not less than one thousand dollars.

The law under consideration provides that "there shall be levied and collected an annual tax \* \* \* from each insurance company or agency not chartered by this state, and whose annual gross receipts for premiums are more than one hundred thousand dollars, one thousand dollars; when less than one hundred thousand and more than seventy-five thousand, seven hundred and fifty dollars; \* \* \* provided that no insurance company whose license tax shall be one thousand dollars shall be liable to any assessment throughout the state, other than that imposed by this article.

Section 7 of the same act provides, "that from every insurer or insurance company not chartered by this state, and transacting an insurance business therein, there shall be collected an annual tax of one per centum upon the gross amount of premiums earned each year from policies issued through agencies in the state."

It is only necessary to place these two provisions of the law side by side to see clearly the meaning of the first.

The effect of the law is this: When the state license tax of a foreign insurance company, under the first provision, amounts

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to a thousand dollars or more, the company is relieved from the payment of any further tax to the state, under the provisions of section 7.

This is the plain and obvious construction. The law under consideration is an act for raising a revenue for the state, and ought not to be construed to extend to other subjects, when such construction is not obviously necessary to give it full effect.

The view we entertain is strengthened by the fact that the act establishing a new charter for the city of New Orleans, approved on the same day as the revenue act, authorizes the city to levy a license tax upon trades, professions and callings, without limitation or restriction. These two acts must be construed together, and such effect given to both, if possible, as shall allow both of them to stand. Under our construction of the revenue act, this is done. The state is allowed to enforce her license tax upon foreign insurance companies to the amount of a thousand dollars, and any state assessment beyond that is excluded, while the power of the city under her charter to levy a license tax is not interfered with. This construction gives full effect to the proviso in the revenue act, and also to the provisions of the city charter authorizing a license tax upon trades, occupations and callings.

We are of opinion therefore that the proviso in the revenue act relied on by complainants does not restrain the city of New Orleans from the collection of the tax complained of.

Finally it is claimed by complainant that even granting that the state of Louisiana has constitutional power to discriminate between foreign and domestic corporations in the matter of taxation, yet the city of New Orleans has no such power.

If the state is not forbidden by either the federal or state constitution from levying the tax complained of, it is difficult to see how any constitutional prohibition can rest upon the city of New Orleans.

The state has conferred generally upon the city the right to levy a license tax upon trades, professions and callings. The only limitations imposed by law upon this power, are:

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**Risher vs. The Frolic.**

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1. That the ordinance levying the tax must not be contrary to the constitution of the United States or of the state of Louisiana.

2. That it must be in harmony with the general laws of the state, and with the provisions of the charter; and

3. That it must be reasonable; and to render it reasonable, it should tend in some degree to the accomplishment of the objects for which the corporation was created and its powers conferred. Cooley on Constitutional Limitations, 201.

We do not think the ordinance under consideration is open to objection upon either of these grounds.

The result of this discussion is that the complainants have not shown, by bill, any ground for the relief prayed.

The motion for the injunction is overruled, at complainant's costs.

NOTE.— Since this case was determined, the supreme court of Louisiana has decided that under the revenue act of 1871, which is identical with the act of 1870, referred to in the foregoing opinion, the payment of a license tax of \$1,000 to the state by an insurance company, exempted it from the payment of any license tax to a municipal corporation. See *City of New Orleans v. Salamander Insurance Co.*, 25 Annual, 650.

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**RISHER VS. THE FROLIC.**

1. In general, unless otherwise specially agreed, the taking of a promissory note for a preexisting debt is treated *prima facie* as a conditional payment only, and is a payment if the note is paid.
2. A negotiable promissory note will operate as an extinguishment of a prior existing debt if it is so intended by the parties.
3. Where a pilot held an account for wages against a steamboat, and took the note of the owner of the boat for the amount, signed by another person as security, due in 30 days, with interest at a rate higher than the account bore, and receipted the account as paid in full by the note; *held*, that these facts, with other circumstances, showed a purpose on the part of the payee to take the note in extinguishment of his debt, and that his lien upon the steamboat was lost.

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Risher vs. The Frolic.

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## ADMIRALTY APPEAL.

Messrs. John B. Cotton and L. L. Levy, for libellant.

Mr. B. Egan, for claimant.

WOODS, Circuit Judge. The libellant claims \$1,060 as the balance due him for wages as pilot on board the steamer Frolic for services rendered as such, from May 1 to June 20, 1866.

The testimony clearly establishes the facts that the services were rendered by the libellant as claimed, and that the compensation charged was the compensation agreed on between libellant and the owner of the boat.

John Haberly intervenes as claimant, and alleges and proves that he is now the owner of the steamer Frolic, having purchased her of Mrs. Mary Hein, the former owner, on the 8th day of May, 1867, and by way of defense avers among other things, that the libellant has lost his lien on the steamer by reason of the following facts, to-wit: that immediately on the termination of his service as pilot, the libellant presented his account therefor to Mrs. Mary Hein, who was then the owner of the boat, and instead of receiving the money for the balance due him, took the joint note of Mrs. Hein and of her husband, J. Hein, dated June 20th, 1866, for the amount thereof, payable to libellant, or order, in 30 days, with interest at 8 per cent., and signed the following receipt at the foot of the account:

“Received payment, in a note at thirty days, in full for the above amount. (Signed), W. W. RISHER.”

Claimant alleges that the taking of this note by libellant was a novation of the debt which extinguished his lien on the boat, and that his only remedy is a personal action against the makers of the note.

In general, unless otherwise specially agreed, the taking of a promissory note for a preexisting debt is treated *prima facie* or as a conditional payment only, that is, as payment if the note is paid. 2 Bailey on Bills, ch. 9, p. 363; *Puckford v. Maxwell*, 6 Tenn., 52; *Owensen v. Morse*, 7 id., 64; *Murray v. Gouverneur*, 2 Johns. Cases, 438; *Elliott v. Sleeper*,

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2 N. H., 525; *Holmes v. De Camp*, 1 Johns., 34; *Putnam v. Lewis*, 8 id., 389; *Bill v. Porter*, 9 Conn., 23; *Van Cleef v. Therassow*, 3 Pick., 12; *Muldon v. Whitlock*, 1 Cow., 290.

But in some of the American states a different rule is applied, and unless it is otherwise agreed, the taking of a promissory note is deemed *prima facie* an absolute payment of the preexisting debt. *Hutchins v. Alcott*, 4 Vt., 549; *Thatcher v. Dinsmore*, 5 Mass., 299; *Whitcomb v. Williams*, 4 Pick., 228.

But in each case the rule is founded on a mere presumption of the supposed intention of the parties, and is open to explanation and rebutter by establishing by proper proofs what the real intention of the parties was, and this may be established not only by express words but by reasonable implication from the attendant circumstances. *Wallace v. Agry*, 4 Mason, 336; *Maneely v. McGee*, 6 Mass., 143; *Watkins v. Hill*, 8 Pick., 522.

A negotiable promissory note will operate as an extinguishment of a prior existing debt, if it is so intended by the parties. The only question is as to the proof of such intention.

In the case of the *Steamer St. Lawrence*, 1 Black., 531, C. J. TANEY says: "The remaining question is, has this lien been forfeited or waived? It was not waived upon the general principles of maritime law by the acceptance of Graham's notes, unless the claimants can show that the libellants agreed to receive them in lieu of and in place of their original claim."

Following this authority, the burden of proof is on the claimant to show that libellant received the note of Mrs. Hein and her husband in payment and extinguishment of his original claim.

Has the proof been made? We think it has.

The receipt of libellant under his own hand declares that he has received the note in payment of his claim. There can be no better evidence of the intention of libellant than his own written declaration made at the time of the transaction.

In *Hunt v. Boyd & Co.*, 2 La., 109, the plaintiff received a draft for his account against the schooner Elizabeth, and un-

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derwrote the account as follows: Received payment by draft on John Boyd & Co. at 30 days' sight. The supreme court, on this said: "We are of opinion that the plaintiff, by taking this draft as payment of the account, extinguished it; and that suit cannot now be maintained on that which was discharged by the agreement which the receipt evidences."

So in *White v. McDowell*, 4 Annual, 543, the supreme court of Louisiana held that when a creditor writes at the foot of an account, "Received payment by note," it is a novation of the debt.

In addition to the distinct declaration in writing that libellant received the note in payment of his claim, the circumstances of the case show that such was his intention.

One circumstance, entitled to some weight, is the fact that the note taken bore a higher rate of interest than the account. This shows that the purpose of libellant in taking the note was not simply to evidence the existence and amount of his claim. It is like the case of taking a note for a greater sum than was actually due on the account, and giving time for payment.

Another circumstance, showing the intention of libellant, is found in the fact that he was employed as pilot on the Frolic in January, February and March, 1867, before Haberly became the owner of the boat, and was paid in full for such services without making any claim, so far as appears, for the amount due for his services in 1866. If he purposed to hold the boat for his services rendered in 1866, it would have been most natural, when receiving payment for similar services rendered in 1867, to have then made his claim therefor. The libellant has been examined as a witness, but is silent as to any such claim.

Moreover, the libellant never commenced any action to enforce his alleged maritime lien for over eighteen months after the note taken by him in payment of the account became due. This circumstance indicates that the idea of setting up his lien upon the steamer was an afterthought.

I think the written receipt of the libellant, and the circum-

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stances of the case, establish that it was the intention of the libellant to receive the note referred to in payment of his account. This fact established, it follows that he has lost his lien upon the steamer, and that his libel must be dismissed at his costs.

Decree accordingly.

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SUAREZ VS. STEAMSHIP GEORGE WASHINGTON.

"A." was the purser of a steamship about to sail from New Orleans to New York. A package marked with his name was delivered to him for which he gave a bill of lading, whereby he agreed to deliver the package to L. in New York, on payment of the value thereof, and in default of payment to return the package to the consignor. The bill of lading indicated that freight had been paid on the package, but no freight was in fact paid or tendered, nor was there any agreement or expectation that freight was to be paid. The package was not placed on the ship's manifest nor stowed with the other freight. "A." was not authorized to sign bills of lading. He delivered the package to the proper person in New York, but neglected to collect its value. *Held*, that the package was delivered to "A." as the bailee of its owner and was not delivered to the steamship, and that the latter was not liable for its value.

This was an admiralty appeal tried on February 20, 1871.

*Mr. E. W. Huntington*, for libellant.

*Messrs. T. J. Semmes and Robert Mott*, for respondent.

WOODS, Circuit Judge. On the 31st of July, 1868, E. S. Allen, the purser of said steamer signed and delivered the following receipt:

"NEW ORLEANS, July 31, 1868.

Received in good order and condition from P. Manich on board Steamer George Washington, one box said to contain 6,000 cigars, marked E. S. Allen, to be delivered to Mr. E. S. Lagram in New York on his payment to Mr. T. Masich of (\$660) six hundred and sixty dollars, or in case of nonpayment by him, for me to return said cigars to Mr. F. Masich, New Orleans. (Signed) E. S. ALLEN, *Purser*."

Freight collected.

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Suarez vs. Steamship George Washington.

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The libel alleges and the proof shows that Masich was only the agent of libellant in the matter; that the box actually contained 6,000 cigars; that they were the property of libellant; that they were conveyed to New York and there delivered without the collection of said sum of \$660. Libellant claims that he has a lien on the steamer for the said sum, and that her owners are jointly and severally liable to him for that amount.

The respondent Moulton answers by way of defense:

1. That Allen did not receive the box of cigars or give the receipt as agent of the owners of the steamer, but undertook to carry said box to New York and deliver it to Lagram as a personal favor to Lagram; and no freight was paid or agreed to be paid thereon, of which Masich had notice when he delivered the box on board the steamer.

2. That the acts of said Allen in the premises were done out of the scope of his employment, and without the knowledge and consent of respondents, and that he was not authorized to sign receipts and bills of lading for freight shipped on board the steamer.

This case turns upon the question, Did the shipper deliver the box to Allen as his bailee or did he deliver it to the steamer through Allen acting as the agent of the steamer?

Upon this point Allen testifies: That about July 25, 1868, while in New Orleans, he received from Lagram, who was then in New York, a letter asking him to bring on a case of cigars from Mr. F. Masich. About that time Masich applied to him personally in New Orleans; stated that he had received a letter from Lagram informing him, Masich, that he thought he, Allen, would bring on the box, and asked him if he would do so, and deliver the box to Lagram. He told Masich he would. He considered the transaction a personal one between Masich, Lagram and himself. At Masich's request he signed the receipt as purser of the steamer in order that Masich might effect an insurance upon the box. He did not intend to sign the receipt as purser of the steamer, and Masich understood the reason of his so signing. No freight was paid or agreed to be

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**Suarez vs. Steamship George Washington.**

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paid on the box. He was not authorized to sign and never did sign receipts or bills of lading for freight except for specie, when he had express orders to do so. No application was made to the office of the steamer's agent, which was customary, and the only place where freight engagements were made. The box was not on the ship's manifest, nor stored with the other cargo of the ship, but put in the bath room as a personal matter of his own.

This testimony is entirely uncontradicted, and there is no evidence whatever to show that freight on the box was ever paid, tendered or agreed to be paid.

These facts clearly establish the character of the transaction, and show that the box was delivered to Allen on his own account, and not as agent or purser of the steamer. Masich clearly so understood the transaction; otherwise, why did he apply to Allen personally and inquire whether he would take the box? He must have known that if he desired to send the box as freight, the steamer would take it, and was bound as a common carrier to take it. The circumstances clearly establish that the purpose of the application to Allen was to get the box transported by him as a friend of Lagram, without the payment of freight, and perhaps also to secure his services in collecting from Lagram the price of the package.

It is within the observation and experience of almost every one that the officers and passengers on steamers frequently take small packages, for carriage and delivery, as a personal favor to the sender, on which no freight is paid or expected to be paid. It would be a great injustice to the steamer to hold her responsible for the safe delivery of such parcels. There is nothing to distinguish this case from the class just mentioned, except the fact that Allen signed a receipt as purser. But he testifies he had no authority so to do, and that he did it at Masich's request in order that he might get insurance on the box, and that Masich so understood it.

The case is that Lagram and Masich attempted to get the box carried to New York without the payment of freight. Masich delivered the box to Allen who became his agent or

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the agent of his principal. Having failed to receive pay for his goods, through the neglect of Allen, he is now seeking to recover their value from the steamer, with which he never made any contract of affreightment, and to which he neither paid, nor agreed to pay, nor tendered any freight.

The record further shows that Allen had no authority to sign receipts or bills of lading, and that the steamer had an agent at New Orleans charged with that duty.

The law says that the principal is bound by all the acts of his agent within the scope of his authority, which he holds him out to the world to possess.

It is clear that the signing of the receipt was not within the scope of the authority conferred on the purser by his employers. So says the testimony. Did they nevertheless hold him out to the world as having such authority? There is nothing in the record to show that they did either expressly or by recognizing his acts in signing receipts, nor does it appear from the testimony that it is by any means a universal custom or even general custom with lines of steamers having agents, to authorize the purser to sign receipts or bills of lading.

The act of the purser in signing the receipt in this case was therefore beyond the scope of his authority, nor had he been held out to the world as having such authority. His principals could not therefore be bound.

The libel must be dismissed at costs of libellant.

Decree accordingly.

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**MAXWELL VS. THE POWELL.**

1. It is no reason why a libellant should not recover for the failure of the defendant to deliver goods according to contract, that no credit is given for the freight earned by defendant in carrying other goods. Such claim should be set up by cross libel.
2. Goods were shipped at New Orleans on "The Caddo" for Jefferson, Texas, and a through bill of lading given. At Shreveport the trip

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of "The Caddo" terminated, and all the goods with the bill of lading were transferred to "The Powell." She delivered a part of the goods and demanded freight from the owner. In a suit to recover the value of a portion of the goods which was not delivered by "The Powell," *held*, that she was liable for the goods lost and could not turn the libellant over to "The Caddo" for his remedy.

3. A general creditor of a ship has no lien on the vessel.
4. When she is attached by process from a common law court, nothing is or can be seized but the interest of the owner remaining after the maritime liens are satisfied.
5. A sale under such seizure conveys only the title of the owners subject to the maritime liens.
6. The fact that the proceeds of the sale were absorbed in the payment of certain preferred maritime liens, and were not sufficient to pay them in full, so that the attaching creditors received nothing, does not relieve the vessel from other maritime liens. A common law court is without power to divest maritime liens except by payment.

## ADMIRALTY APPEAL.

*Mr. Wm. M. Randolph*, for libellant.

*Mr. Gustavus Schmidt*, for claimant.

WOODS, Circuit Judge. The libellant claims to recover the sum of three hundred and twenty-five dollars and seventeen cents, by reason of the failure of defendant to deliver goods of that value, the property of libellant, which the defendant received at Shreveport, Louisiana, and undertook to transport to Jefferson, Texas.

One Nicholas Quizzaro, claimant, intervenes and defends upon the following grounds:

1. Because the libellant has failed to establish his demand by proof.

2. Because he refuses to do justice by giving credit for the freight earned by the steamer in transporting the goods of libellant.

3. Because libellant should have proceeded against the steamer Caddo, with which the contract of affreightment was made, and by whose master the bill of lading was signed.

4. Because the claimant purchased the steamer Powell at a judicial sale made by order of the 4th district court of the

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parish of Orleans, in the state of Louisiana, in an action of foreign attachment against the owners.

5. Because the proceeds of said judicial sale were absorbed by the claims of privileged creditors, so that the attaching creditors received nothing, and if libellant had intervened in the case he would have received nothing.

6. And, finally, because the libellant has slept upon his claim and is not entitled to the aid of this court.

Of these defenses in their order:

(1) I am satisfied, from a careful scrutiny of the testimony, that the claim of libellant is established.

The captain of the Powell admitted in substance the receipt of the goods for carriage from Shreveport to Jefferson. He admitted the failure to deliver the goods at Jefferson; promised to bring them up on his next trip and failed to do so. He agreed to pay their value, and said he had paid it to Phelps & Co., correspondents of libellant in Shreveport, which was false. The value of the goods is sufficiently established by the testimony of libellant and of his clerk.

(2) If the defendant has any claim against libellant for freight it should have been set up by cross libel, and the failure of defendant or claimant to do this cannot be alleged as a reason why libellant should not recover.

(3) It appears from the evidence that the goods of libellant were shipped at New Orleans on board the steamer Caddo, and a through bill of lading given by the Caddo. At Shreveport the trip of the Caddo terminated, and the goods with the bill of lading were transferred to the Thomas Powell. She carried the larger part of the goods to Jefferson, but failed to deliver the portion sued for in this action. Her master presented the bill of lading issued by the Caddo and demanded freight of the libellant. In undertaking to carry the goods from Shreveport to Jefferson, under the Caddo's bill of lading, she assumed the duties and responsibilities of a common carrier, and after delivering a portion of the goods and demanding freight, it is too late for her to claim exemption from liability and to turn the libellant over to the Caddo for his remedy.

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(4) The main and interesting question in the case is, whether the sale of the Powell, in a proceeding by foreign attachment in the state court of Louisiana, divests the lien of the libellant?

The record of the state court, which has been submitted to us, shows that the suit in attachment was brought by the plaintiffs in attachment to recover the amount of a debt due generally from the owners of the Powell to the plaintiff; that the owners were nonresidents of the state of Louisiana, but that they had property, to-wit, the steamer Thomas Powell, situate in the parish of Orleans in said state. The steamer was seized by virtue of the writ of attachment, and was sold. Certain seamen and material men intervened, and their claims exceeded the amount for which the steamer sold.

A general creditor of a shipowner has no lien on the vessel. When she is attached by process from a common law court, nothing is taken or can be taken but the interest of the owner remaining after the maritime liens are satisfied. The seizure does not reach them. The thing taken is not the whole interest in the ship, and the only interest which this process can seize is a secondary and subordinate interest, subject to superior and paramount claims of lien holders. Under the attachment process from the state court, nothing was legally in the custody of the sheriff but the interest of the owner, whatever it might prove to be after the liens were adjusted. The common law process was not a proceeding *in rem* to charge the vessel with the debt, for the creditor had no lien upon her, and the court no jurisdiction over anything but the owner's residuum. The whole ship could not be sold so as to convey an absolute right of property to the purchaser.

The constitution and laws of the United States confer the entire admiralty and maritime jurisdiction expressly upon the national courts, and admiralty and maritime liens are therefore outside of the line which marks the authority of a common law court of a state and excluded from its jurisdiction. And if a common law court sells the vessel to which the lien has attached upon condemnation to pay the debt, or on account of its perishable condition, it must sell subject to the maritime

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liens, and they will adhere to the vessel in the hands of the purchaser and of those claiming under him. *Certain Logs of Mahogany*, 2 Sumner, 589; *Poland v. Brig Spartan*, Ware, 130; *Scow Bolivar*, Olcott, 480.

While, therefore, we hold that the judicial sale by order of the state court conveyed the title of the owners to the purchasers, it did not divest the maritime liens, but the purchaser took subject to those liens.

The defense, that the proceeds of the vessel under the sale in the state court, were not sufficient to pay preferred liens, it seems to me is not tenable. *Non constat*, that the vessel would have brought sufficient to pay all liens if sold by an order of a court of admiralty, by which the title to the steamer itself would have been conveyed. The purchase price at the sheriff's sale may have been insufficient to pay the claims of intervening lien holders because the purchaser knew that he was not receiving an unincumbered title.

It only remains to consider whether the libellant has lost his lien by delay. An examination of the testimony satisfies me that he has been quite vigilant in the assertion of his claim. It is not pretended that he had any actual notice of the proceedings in the state court. He endeavored to have the Powell seized both at Jefferson, Texas, and at Shreveport, and failing in these attempts, he, without unreasonable delay, commenced this proceeding.

I am of opinion, therefore, that there should be a decree in favor of libellant against the Thomas Powell for the value of the goods not delivered.

Decree accordingly.

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Gaines vs. New Orleans. Gaines vs. Lizardi and others.

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APRIL TERM, 1871.

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GAINES VS. NEW ORLEANS. GAINES VS. LIZARDI and others.

1. The rule of practice is, that no exceptions to a master's report will be heard by the court, which have not been made before the master; and in the absence of very special circumstances, the court will feel bound to enforce it.
2. Unless some particular matter is pointed out in which the master has committed an error, or unless it be shown that he has adopted some erroneous principle on which his account or calculation is based, his report will be allowed to stand.
3. In Louisiana, where the possession is in bad faith, the possessor will not only be charged with what he has received, but with what he might have received; in other words, with the worth or value of the property.
4. Possessors in bad faith cannot, by the law of Louisiana, claim the benefit of prescription with regard to rents and profits, any more than with regard to the land itself.
5. Under the law of Louisiana, possessors in bad faith are entitled to compensation for improvements which they have erected, if accepted by the owner. The latter may require them to be removed.
6. Manner of estimating rents and profits on lands, buildings and draining machine in possession and use by the city of New Orleans.

These were cases in equity, and were heard upon exceptions to the master's report.

*Messrs. E. T. Merrick and J. Q. A. Fellows*, for complainant.

*Messrs. Miles Taylor, H. M. Hyams and J. McConnell*, for defendants.

BRADLEY, Circuit Justice. In these cases the defendants except to the master's report. It does not appear, by the report of the master's minutes, that the exceptions were taken before him. The rule of practice is that no exceptions will be heard by the court which have not been made before the master, so as to give him an opportunity of considering the same and correcting his report. But as counsel on both sides have evidently acted under a misapprehension of the rule, I will not

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overrule the exceptions on that ground, especially as some of them are of great importance to the rights of the parties. But it is desirable that the rule should be observed, and hereafter in the absence of very special circumstances, the court will feel bound to enforce it. It was declared by the supreme court of the United States, in *McMicken v. Perin*, 18 How., 507, and in other cases there referred to.

The principal exceptions are :

1. That the defendants did not realize the rents and profits which the master has charged them with. As this is a matter of fact arising upon the evidence, the court will not undertake to reexamine and retry the whole case; but will allow the report to stand, unless some particular matter is pointed out in which the master has committed an error, or unless it be shown that he has adopted some erroneous principle on which his account or calculation is based. It must be remembered that where the possession is in bad faith, the possessor will not only be charged with what he has received, but with what he might have received; in other words, with the worth or value of the property.

The case of the city will be adverted to more particularly hereafter.

2. It is excepted, secondly :

That the master has not allowed the defendants the prescription of three years for rents and profits received by them before the commencement of the suit. In this the master only followed the decree. The supreme court of the United States decided that the defendants were possessors in bad faith, chargeable with notice of the defectiveness of their title, and that they must severally account to the complainant for the rents and profits received by them, from the time that they severally came into possession; and, being possessors in bad faith, I think, by the law of Louisiana, they cannot claim the benefit of prescription with regard to rents and profits, any more than with regard to the land itself. There are repeated decisions to this effect, some of which are referred to in 2 Hen-  
nen's Dig., tit., Possessions, II a, p. 1195, No. 5. And Touillier

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says: "Bad faith renders him (the possessor) liable to account for not only the fruits which he has received, but even those which he might have received, and which have perished by his negligence; and this obligation is extinguished only by the prescription of the thing itself; and restitution is due from the day when the bad faith commenced. (Droit Civile Francaise, vol. 3, pp. 71, 72.)

The defendants' counsel have referred me to a provision of the code of 1808, which declares that the prescription of 30 years may be pleaded even by a knavish possessor. Precisely the same provision is found in article 3438 of the present code, only a little differently rendered in English. It reads thus: "The same species of property is prescribed for by 30 years, without any title on the part of the possessor, or whether he be in good faith or not."

The species of property referred to is immovables.

It is a sufficient answer to the argument derived from this article to say that it was not overlooked by the supreme court of the United States, and that its rejection as applied to this case is *res judicata*. And it is hardly necessary to remind the defendants, that if Mrs. Gaines did not arrive at full age until December 31, 1827, as alleged in the bill, the 30 years had not expired when the bill was filed, letting alone the previous litigation of many years which had interrupted the prescription.

3. The defendants except, thirdly: Because the master charges them with the rents and profits of the buildings and improvements, as well as of the land in its original state as owned by Daniel Clark. They claim that they are entitled to the use of the improvements, whether erected by themselves or by their predecessors in possession, and are liable to the complainant only for the use of the lands as Daniel Clark left them.

This objection involves the general question of the defendants' right to compensation for improvements and the extent thereof and exceptions thereto. Generally speaking, according to article 500 of the present code, which is identical with the corresponding article in the code of 1808, and with article 555 of the Code Napoleon, when plantations, constructions and

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works have been made by a third person, with his own materials, the owner of the soil has the right to keep them, or to compel the author to take away or demolish them. If he keeps them, he must pay for the value of the materials and the price of the labor. In other words, he must pay for their original cost. From the moment he approves of and accepts the improvements, he is regarded as having ordered them. *Locré*, vol. 8, p. 181.

This rule is a modification of the Roman law, which made a distinction between necessary and useful works. If necessary to the preservation of the property, the possessor in bad as well as in good faith was entitled to compensation; but if useful only, whilst the latter was entitled to reimbursements, the former had only the right to withdraw and keep the gain which he had derived from the improvements. The Roman rule seems to be adopted in this state, in the case of improvements which cannot be separated from the property, and cannot, therefore, according to article 500, be removed at the owner's option, such as the clearing of wild land and rendering it fit for cultivation. In such cases the possessor is permitted to retire with the profits he may have made, but without any claim of compensation for his labor. *Gibson v. Hutchins*, 12 Annual, 547, overruling the previous case of *Pearce v. Fantum*, 16 La., 422.

The supreme court of this state seems also to have established another exception to the general rule laid down in the code, namely, that a possessor, knowing that he has no title, that is, a mere trespasser or intermeddler, is not entitled to any compensation for improvements. This was held in the case of *Herriot and another v. Broussard*, 4 Martin, N. S., 267. The court say: "The defendant's claim for remuneration on account of ameliorations or improvements on the disputed premises was properly rejected by the court below. He is not one of those possessors to whom our laws accord such a right; he knew that he held no title, for he did not accept that intended to be conveyed, etc."

The same doctrine is laid down in *Gibson v. Hutchins*, 12 Annual, 547. Referring to a previous case not reported, the

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court say: "We said in *Hemkin v. Overly*, that we are unable to recognize the doctrine that one who makes improvements upon property to which he knows he has no title has any legal or equitable claim to reimbursement for such improvements."

The court applies the doctrine to the case of a settler, who takes possession with the hope of a preemption. "Until he actually makes his entry, he knows he has no title. He has an expectancy and nothing more. He is a tenant by sufferance. \* \* When the government parts with the title to a third person, that title carries with it such inseparable ameliorations as the land may have received from the settler. The settler has no claim upon the owner. Of course the possessor, who knows he has no title, is a possessor in bad faith."

A subsequent case to that of *Gibson v. Hutchins*, *Cannon v. White*, reported in 16 Annual, 85-91, leaves us in some uncertainty as to the true distinctions to be made on this subject. The defendant in that case had reason to suspect his grantor's title (which was a fraudulent one), and was held to be a possessor in bad faith. He went into possession in 1853, when only 250 acres of the land was under cultivation. He remained in possession 8 years, and made and erected improvements valued at \$5,250. The court considered that the use of the 230 acres of additional clearing and the cord wood consumed, more than compensated for the expense of clearing, and set off one against the other. But they allowed him compensation for his other improvements. In other words, he was allowed for his inseparable improvements (the additional clearing) only what he was able to realize therefrom, in accordance with the doctrine of *Gibson v. Hutchins*, and for his constructions he was allowed cost.

In the cases before us, the bill charges and the decree declares that the defendants purchased with full notice that the auction sale of Relf and Chew was illegal, null and void, and in fraud of the rights of complainant, and the defendants are decreed to surrender the property to the complainant forthwith, and to account to her for all the rents and profits from the time they came into possession. No deduction or limitation is mentioned

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except this, that the account should be taken subject to the laws of Louisiana in cases of such recovery. The fair interpretation of this limitation is, that these laws are to determine what elements go to make up rents and profits, and what are the proper allowances to be made in estimating the same under judgments or decrees of this kind.

How is this limitation to be applied in this case?

The bill prayed possession of the property and an account and payment of all the rents and profits. The decree grants both without restriction. The defendants, in their answers, did not ask for any deduction or allowance for improvements. They placed themselves altogether upon their title and the invalidity of the complainant's title. They defended the title only. Nothing was said about improvements; and even when they came before the master, no statement in writing is made setting up any such claim. The defendants, if they relied on such a claim, ought to have presented to the master a statement of facts in writing, setting forth their claim, and forming a basis for revisory action, if proper, on the part of the court. The claim of the defendants is full of embarrassments. Nevertheless, on account of neglect of the proper forms of presentation, if they are really entitled to compensation for improvements under the law of Louisiana, and if that subject has never been considered by the supreme court, it would be very hard to conclude them by the mere forms of law. The supreme court has expressly decreed that the complainant should have immediate possession of the disputed property. The claim for improvements, therefore, if it exists at all, cannot interfere with the surrender of possession. It must either be adjusted in the account for rents and profits or by a subsequent proceeding. A subsequent proceeding would be intolerable on account of the increase and protraction of the litigation that would ensue. The clause of the decree above referred to, requiring the account to be taken subject to the laws of Louisiana, opens a way for the adjustment of this question before the master, upon proper proceedings to be had on the part of the defendants.

Upon a careful examination of the law, I am of the opinion

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that the defendants, were it not for the difficulties presented by the pleadings, would be entitled to compensation for their improvements erected on the land. And as the question seems never to have been presented to the supreme court for adjudication, the want of a decree for such compensation is not necessarily to be regarded as *res judicata* against the claim. And although the fact that the defendants have never formally set up such a claim in their answers or in any proceeding in the case, presents a strong barrier to its allowance, and although it may be a great stretch of indulgence on the part of the court to allow it to be set up at this time, still the court may avail itself of that clause of the decree which directs the accounts of rents and profits to be taken, subject to the laws of Louisiana, as a basis for its allowance before the master on a proper presentation of the facts before him. But the defendants are in gross laches, and as a condition of referring the cases or any of them back to the master for this purpose, they must first severally pay the costs of the proceedings already had before the master; and when any case comes up before him, the defendant concerned must present a written statement of the facts on which he bases his claim, together with a statement of the cost of the improvements claimed, in order that the complainant may then elect within thirty days from the master's report thereon, whether she will keep the improvements, or have them removed at the expense of the defendant. Her election should not be regarded as made by reason of her taking possession of the property with the improvements on it, because no proper claim for improvements has ever been made in the cause. And the presentation of the claim under oath is not to be regarded as superseding due proof thereof. Of course the statement should show when the improvements were erected, and by whom, and if not erected by the defendant, that he purchased the same with the property. Where the grantor and grantee are both parties to the cause, the supreme court of this state has decided that the improvements should be apportioned between the grantor and grantee in proportion to the improvements made by each. *Lejeune v. Barrow*, 11 Ann., 501.

But that will depend on the fact whether the grantee has or has not paid for them, and does or does not look to his grantor for indemnity.

In taking this account, I consider the decree of the supreme court as requiring, and the law of the case to be, that the entire rents and profits are to be accounted for by the defendants. As the accounts have already been taken by the master on this basis, with due allowances for all ordinary expenses for repairs, insurance, taxes, etc., that part of the work will not require to be repeated.

The case of the city is a peculiar one. The estimation of the rents and profits in that case is so uncertain and speculative, that I do not feel entirely satisfied as to the decision that should be made. The master evidently felt the same embarrassment. He says: "As the city received no rents whatever, and no profits, except by the increase of its revenue, it is difficult to fix the amount to which she (the complainant) is justly entitled. The master presents facts and figures which he trusts will enable the court to arrive at an equitable conclusion." He then gives the estimate of various witnesses as to the annual value of the premises, including the draining machine, the average of which was \$8,000; and, after deducting the cost of the machine and all improvements and repairs, he brings the city in debt the sum of half a million dollars (\$500,000). Another estimate based on the additional revenues derived from the lands reclaimed by the use of the machine, after deducting cost and repairs, shows a profit of two hundred and eight thousand, eight hundred and twenty-five dollars (\$208,825). Both of these estimates are vague, uncertain, and somewhat speculative.

A third estimate is made, based on the value of the land and buildings, without the drainage machine, and giving credit for ordinary repairs to the buildings, independent of the machine. This makes the rents \$157,600, and the repairs \$32,333.21, leaving a balance of \$125,267.79. As the master has not signified his adoption of either of these estimates, but has stated the facts to the court for its equitable determination, I have come to the conclusion that it would be equitable and just to

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set off the profits derived by the city from the drainage machine for the past 35 years, against the cost of construction and repairs, and to charge the city with the rents of the building and land, less the ordinary repairs of the buildings, amounting, as shown by the report, to the sum of \$125,267.77. Whilst the profits and advantages of the drainage machine were indefinite and uncertain in amount, there is no doubt of their reality, nor, if we can place any reliance upon the estimates, is there any doubt of their being amply sufficient to reimburse the city for all its expenditures, including even the rent with which it is charged.

A decree will be made confirming the report of the master in the case of *The City of New Orleans*, upon the basis of the last alternative stated in his report; and also confirming his several reports in the other cases as far as they have gone, with leave, however, to each of the defendants in the other cases, upon payment of the master's costs respectively, to have a further reference to the master for estimating the compensation due to them for improvements, upon the terms and principles above stated in this opinion.

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**FUENTES VS. GAINES. OTHER PLAINTIFFS VS. SAME.**

1. If, in a case in equity any circumstances exist which render it improper or inequitable to carry on proceedings in the court, they can always be brought to the notice of the court by motion or petition in the suit; or may be pleaded in bar or abatement. A formal bill for the purpose is needless litigation.
2. Under the law of Louisiana the probate of a will is not conclusive against parties in possession of property which is sought to be recovered from them by virtue of it, unless they were parties litigant in the probate proceedings.
3. When the validity of a will is brought in question incidentally on question of title to property, it is open for investigation in any court in which the title may be litigated, whether a state court or a court of the United States.

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4. The United States courts in attempting to administer state laws must do so fairly, so as to secure to suitors all their just rights under those laws; otherwise, they may be the means of much injustice and oppression.
5. When, in a chancery suit in the U. S. courts, a question of title to property is involved in the validity of a will, parties to the suit who are not barred by prescription, waiver, estoppel or some other supervening cause, may contest its validity by answer, or by proceedings in the court of probate for a revocation of the probate, or in both methods.

Bills in Equity, heard on motion for injunction.

*Messrs. E. T. Merrick and J. Q. A. Fellows*, for complainant.

*Messrs. Miles Taylor and J. McConnell*, for defendant.

BRADLEY, Circuit Justice. This is a bill for injunction to stay proceedings in this court.

I have been unable to find any precedent for such a bill; and I cannot see the necessity of it. If any circumstances exist which render it improper or inequitable to carry on proceedings in this court, they can always be brought to the notice of the court by motion or petition in the suit, or may be pleaded in bar or abatement. A formal bill for such a purpose seems to me to be needless litigation, and I shall direct the bill as such to be dismissed, but allow it to stand as a petition in the several suits sought to be suspended, not requiring the complainant to file any formal answer or other pleading thereto.

Supposing the matter to be properly brought before the court on petition and motion thereon, the question arises whether the proceedings in this court ought be stayed, pending the suit brought in the second district court of the parish of Orleans for the revocation of the will of Daniel Clark.

The solution of this question depends upon that of a prior one; whether the defendants in the cases pending in this court are entitled further to litigate the will of Daniel Clark on which the complainant's claim is based.

From an examination of the law of Louisiana, I am satisfied that the probate of a will is not conclusive against parties in

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possession of property which is sought to be recovered from them by virtue of it, unless they were parties litigant in the probate proceedings. It may be and probably is *prima facie* evidence of the validity of the will, but it does not prevent the defendants from showing the will to be invalid. *Bouthemy v. Dreux*, 10 Martin, 1; *O'Donogan v. Knox*, 11 La., 389; *Robert v. Allier*, 17 id., 5; *Rachal v. Rachal*, 1 Rob., 115; *Duplessis v. Lombard*, 10 id., 193; *Sophie v. Duplessis*, 2 Ann., 725; *Succession of Dupuy*, 4 id., 571; *Abston v. Abston*, 15 id., 137. This is analogous to the rule which prevails in England and in several states of this country as to wills of real estate. In this state it seems to apply to wills of all kinds of property.

While this is the general rule, I do not mean to decide any subsidiary question which may arise in these cases—such as whether the defendants are prescribed by lapse of time to contest the will or the probate thereof. Such questions will be properly decided when they arise in each case. But being satisfied that the general rights of the defendants are such as I have stated, the next inquiry is, In what manner shall they be allowed to raise the issue?

If it were a new question, I should unhesitatingly say that they could raise it in this court; and could either require a decision upon it from the court itself, as upon one of the necessary questions in the cause or upon a separate issue of *devisavit vel non*. If the defendants are not concluded by the probate, I see no reason why they cannot contest the validity of the will in these suits. It was never supposed that the validity of a will of real estate could not be questioned in a chancery suit, where it was set up as a ground of recovery or defense. It is true that the court has refused to entertain a suit for setting aside a will on the ground of its having been obtained by fraud. But in all other cases the well known issue of *devisavit vel non* shows that the court has entertained jurisdiction of the validity of wills of land from time immemorial, whenever the question has properly arisen in an equity suit. If it has not entertained like jurisdiction with regard to wills of personality, it has been because the probate thereof, in the ecclesiastical

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courts of England, and in the probate courts of the other states, have always been deemed conclusive upon all persons.

In the case of *Gaines v. Relf, Chew et al.*, 2 How., 650, the court seems to consider that there would be no difficulty in testing in this court the will of 1811 by an issue of *devisavit vel non*: and from a careful examination of the opinion of the supreme court in the case of *Gaines v. Hennen*, 24 How., 553. I am satisfied that the court regarded the validity of the will of 1813 as open to contestation in the circuit court. It was expressly conceded that the admission of the will to probate did not exclude any one who might desire to contest the will with Mrs. Gaines from doing it in a direct proceeding, or from using any means of defense by way of answer or exception, whenever she should use the probate as a muniment of title. The court moreover says: "And the probate does not conclude Relf and Chew, or any other parties having an interest to do so, to oppose the will when it shall be set up against them, by such defenses as the law will permit in like cases. It was with those qualifications of the probate of the will of 1813 that the case was tried in the court below, and they have been constantly in our minds in the trial of the appeal here." p. 558. The court then says: "It is due to the merits of the controversy to advert to the decisions of the probate court of the second district of New Orleans and to that of the supreme court, reversing it, more minutely than has been done, especially, too, as they are coincident with our conclusions upon the testimony regarding the execution by Mr. Clark of his olographic will of 1813, and the concealment of destruction of it after his death." It thus appears that the court was prepared to examine the question of the validity of the will on its merits, had it been directly attacked, and had the question been directly raised in the pleadings. But it was not so raised in that case nor in the subsequent case of *Gaines v. The City of New Orleans*, 6 Wall., 642. In these cases the defendants contented themselves with contending that the probate was null and void, because the probate of the prior will of 1811 had not been directly revoked. This point being ruled against them, the will of 1813 stood un-

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assailed upon the probate awarded by the supreme court of Louisiana, which was regarded as conclusive until the contrary should be shown. It is true that in the case of *Gaines v. New Orleans*, 6 Wall., 703, it is said: "When a will is duly probated by a state court of competent jurisdiction, that probate is conclusive of the validity and contents of the will in this court."

But it was not necessary to decide this point in that case, and whilst the remark is strictly true with regard to wills of personalty in nearly every state in the union, it is not true with regard to wills of realty in many states; and I do not suppose it to be true with regard to wills of either realty or personalty in Louisiana. If the state courts are not bound by the probate, I do not see why the United States courts should be bound thereby. I am referred to the opinion of this court delivered in May term, 1870, upon an application of Mrs. Gaines to remove into this court proceedings instituted in the second district court of the parish of Orleans by Fuentes and others for the revocation of the probate of the will of 1813.

We then held that we had not probate jurisdiction and could not entertain the questions which were raised in that case. Such is still my opinion. But that is where the direct object of the proceeding is the granting or revocation of probate; not when the validity of the will comes up incidentally on a question of property. The probate of the will is granted for the purpose of administering the estate of the deceased, and confers authority upon the executor to do all things necessary to that end.

But if the executor of any other person claims, by virtue of the will, property in the possession of a third person, who was not a party to the probate proceedings, and who claimed by a title adverse to the will, such third person is not concluded as to its validity by the probate.

Such I understand to be the laws of Louisiana, and when the validity of the will is brought in question in this incidental way, it is open for investigation in any court in which the title of the property may be litigated, whether a state court or, a court of the United States.

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If, then, the defendants are not concluded by the probate of 1856, but have still the right, unless barred by prescription, waiver, estoppel, or some other supervening cause, to contest the will under which the complainant claims, they ought in some way to have the benefit of the right. The United States courts, in attempting to administer state laws, must do so fairly, so as to secure to suitors all their just rights under those laws, otherwise they might be the means of much injustice and oppression.

We, then, come back to the question whether proceedings ought to be stayed in this court in the several cases referred to, until the defendants can bring to a termination the proceedings instituted by them in the second district court of New Orleans for a revocation of the probate granted in 1856 — of course, the application cannot be entertained in reference to the cases that have gone to a decree. They must be regarded as concluded. It can only be entertained in reference to those cases which are still undetermined, none of which, as I understand it, are now at issue.

Answers are yet to be filed therein.

In view of the considerations which I have before stated, it is competent for the defendants to contest the validity of the will, either by answer in these cases, or by proceedings for a revocation of the probate in the parish court, or in both of the methods. Under these circumstances stay of proceedings in this court is a matter entirely in the discretion of the court. Had the defendants promptly resorted to the district court for redress, I should have felt it my duty to suspend proceedings here until they could have had a fair opportunity to get the decision of the parish court. But, as the supreme court remarks, in *Gaines v. New Orleans*, 6 Wall., 703, the probate has been allowed to rest now for twelve years (now fifteen years), and it seems to me unreasonable to tie the hands of the complainant. I think I am bound in all the causes to proceed if the complainant shall so elect; and if the defendants are successful in procuring a revocation of the probate in the parish court before the closing of testimony in this court, they will

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then have the benefit of it; otherwise they must depend on a contestation of the will in the causes pending here.

The application is refused.

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GAINES VS. MAUSSEAU and others. GAINES VS. CRONAN and others. GAINES VS. COMPTON and others.

1. If evidence of defendant's title furnishes evidence of the complainant's, the latter may compel a discovery of it.
2. The fact that in Louisiana titles are registered in a public office does not affect complainant's right to call for such discovery.
3. A bill is not objectionable for multifariousness because it joins defendants holding distinct tracts of land, under distinct conveyances, if the main ground of defense is common to all the defendants.
4. If fraud is charged against executors in proving a will, and acting under it, and notice of such fraud before their purchase of the property is alleged against the other defendants, a suit at law could not give adequate relief.
5. If a plea contain matter proper for a demurrer, for a plea in bar, for a plea in abatement, and for an answer, it is bad for duplicity.

These were bills in equity, and came on for hearing on demurrers and pleas.

*Messrs. E. T. Merrick and J. Q. A. Fellows*, for complainant.

*Messrs. Miles Taylor and James McConnell*, for defendants.

BRADLEY, Circuit Justice. These cases come up on demurrers and pleas. The bills are similar in character, and a description of one is a description of all. They are all substantially in the same form, as were the bills in the cases of *Gaines v. Hannen*, 24 How., 553, and *Gaines v. New Orleans*, 6 Wall., 642.

The complainant in each of these bills alleges that she is the legitimate daughter of Daniel Clark, deceased, who died in August, 1813; and that said Clark, by his will, dated July 13, 1813, declared the complainant to be his legitimate and only daughter, and made her his universal legatee; that he died

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seized and possessed of several tracts of land and real estate in the city of New Orleans and its vicinity, a description of which is given; that in the year 1811, he had made another will (which was revoked by the will of 1813), by which former will he made his mother, Mary Clark, his universal legatee, and one Relf and one Chew executors; that the defendants claim the lands possessed by them, which are parcel of the lands described as belonging to Daniel Clark, under and by virtue of sales made by Relf and Chew as such executors; whereas the bill charges that such sales were void; that the requisite formalities were not observed to authorize executors to sell; that no orders to sell were made by the proper judges; that the proceedings were in divers other respects, specified in the bill, defective and illegal; and that the defendants were chargeable with notice of these illegalities when they became purchasers of the property held by them respectively. The bill sets out the probate of the will of 1813, and various collateral matters relating to the history thereof, and of the complainant, and prays for a discovery of the particular deeds and chain of title under which the defendants severally claim; and a discovery and account of the rents and profits received by them respectively; and a decree that the property be delivered to the complainant. The bill is objected to:

1. Because it seeks discovery of the defendant's title. It is undoubtedly, a general rule that the complainant cannot compel the defendant to discover the evidence of his (the defendant's) title when it does not also constitute evidence of the complainant's title. But if it does furnish evidence of the complainant's title, then it is not privileged from discovery. It is laid down distinctly that a complainant "is entitled to a discovery of everything which may enable him to defeat the title which it is expected will be set up against him." Pollock on Production of Documents, p. 22, vol. 77, Law Library. "If the defendant," says the Lord Chancellor, in one case, "pleads that a certain deed forms a part of his title, and withholds the deed, he cannot be compelled to produce it, because it is the defendant's title, and not the plaintiff's; but if the plaintiff

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iff alleges that the deed contains something which would show that the plaintiff is entitled, to support the plaintiff's title, the defendant is bound to answer that question. He may not be bound to produce the deed, if he negatives that ground on which the plaintiff claims the inspection of it; but then, although it is the defendant's title, it is part of the plaintiff's evidence, and may be the most important part of the plaintiff's evidence, who may find in a deed constituting the defendant's title a recognition of that which, if true, would supersede the title set up by this subsequent instrument." *Att'y Gen. v. Corp. of London*, 12 Beav., 8.

This is precisely the case here. The complainant alleges that defendants hold under the void sale of Relf and Chew. If this be true, the complainant's case is established. For as both titles are derived from Daniel Clark; one through the will of 1811, and the other through the will of 1813; the latter title must be the best. It is important to the complainant, therefore, to show that the defendants do claim title under the will of 1811. This is a part of her evidence of title as against the defendants. Of this evidence she is entitled to a discovery. If the defendants do not, either immediately or remotely, derive title from Relf and Chew under the will of 1811, they can so state in their answer, and thus excuse themselves from showing how they do derive their title. But they must be careful not to deny what they are legally bound to know.

The fact that, in this state, titles are registered in a public office, does not alter the case. The defendants may, possibly, rely on other titles than those which are registered. And, moreover, the complainant is not bound to search the records for the purpose for which she desires this discovery.

2. The next ground taken is, that the bill is multifarious, because it joins defendants holding distinct tracts of land under distinct conveyances. This very question was fully discussed in the first case which the complainant brought in this court for the recovery of her rights; the case of *Gaines v. Relf, Chew and others*, commenced in July, 1836, and reported in 2

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Howard, 619. The various tracts of which Daniel Clark died seized were described by the bill in that case, as in this; and recovery was sought against a large number of persons in possession thereof, as is sought here; and on demurrer in this court, the judges were divided in opinion. The case being certified to the supreme court, it was held that the bill was not objectionable for multifariousness in the respect referred to. The court say: "The main ground of defense, the validity of the bill of 1811, and the proceedings under it, is common to all the defendants. Their interests may be of greater or less extent, but that constitutes a difference in degree only, and not in principle. There can be no doubt that a bill might have been filed against each of the defendants, but the question is, whether they may not all be included in the same bill. The facts of the purchase, including notice, may be peculiar to each defendant; but these may be ascertained without inconvenience or expense to codefendants. In every fact which goes to impair or establish the authority of the executors, all the defendants are alike interested. In its present form the bill avoids multiplicity of suits, without subjecting the defendants to inconvenience or unreasonable expense." 2 How., 643, 644. Two distinct matters were introduced into that case, in which the majority of the defendants were not interested; namely, the claims of Catharine Barnes and her husband, and the account prayed against the executors, Relf and Chew. The court permitted the bill to be amended by the omission of these matters, and, with that amendment, held it to be unobjectionable.

That case is precisely in point, and must be considered as governing this.

3. The next objection is, that the complainant has a sufficient remedy at law. This point, if well founded, could not have escaped the attention of the eminent counsel who argued the cases of *Gaines v. Hennen* and *Gaines v. The City of New Orleans*, before the supreme court. Some of the very cases now before me were before that court then. And the very same point was taken in the answers of the defendants in the

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**Gaines vs. Mauseaux and others.**

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latter case, and must have been passed upon by the court, although not formally discussed in the opinion.

The precise question was also raised in the before mentioned case of *Gaines v. Relf and Chew*, 2 Howard, 619. And although the executors of the will of 1811 were parties to that suit, and were charged with fraudulently setting up that will, yet jurisdiction was sustained, as well in view of the peculiar nature of the case, independent of that part of it. The point is discussed by the court on pages 647-650, and on page 649, the following observations occur: "But the controversy is rendered complicated by the numerous parties and the various circumstances under which the purchases were made. Besides, many facts essential to the complainant's rights are within the knowledge of the defendants and may be proved only by their answers. Of this character is the fraud charged against the executors in proving the will and acting under it, and the notice of such fraud before their purchase, alleged against the other defendants. If fraud shall be established against the executors, and a notice of the fraud by the other defendants, they must be considered, though the sales have the forms of law, as holding the property in trust for the complainants. Under these circumstances a suit at law could not give adequate relief. A surrender of papers and a relinquishment of title may become necessary. The powers of a court of chancery in this view are required to do complete justice between the parties."

In view of these considerations, the supreme court, in that case, returned for answer, the circuit court had jurisdiction of the case, and that it did not belong exclusively to a court of law.

Add to this the discovery sought in relation to the claim of title by the defendants under the will of 1811, and in relation to the rents and profits received by them, and it will appear that the elements of equitable jurisdiction are sufficiently involved in the case.

4. Several matters are set up by way of plea. A glance at these pleas shows, however, that they not only contain matter not proper for a plea, but that they are bad for duplicity.

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**Gaines vs. Mausseaux and others.**

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It is a general rule, that a plea must contain but one matter or point, and that only one plea can be filed to the whole bill, or to any specific part thereof. (Story's Eq. Pl., §§ 652-657.) The pleas in these cases really amount to answers. The matters set up therein can as well be set up in answers as in pleas, and several of the points made are such as have already been disposed of on demurrer. Most of them are a jumble of different defenses. Take for example the pleas of Mrs. Matthews, in case No. 5058: "For her several and separate pleas," to use her own language, "she doth say:" I give the substance of the pleas that follow:

1. That the complainant has a complete remedy at law.
2. Prescription for thirty years.
3. That the defendant has made expensive and useful improvements for which she is entitled to compensation by the laws of Louisiana.
4. That a suit in chancery deprives her of a trial by jury to which she is entitled by the 7th amendment of the constitution.
5. That a suit is now pending in the state probate court (2d district court of New Orleans), in which the validity of the will of 1813 is called in question.

In this paper we have presented to us, mixed up together, matters proper for a demurrer, for a plea in bar, for a plea in abatement, and for an answer, and severally unsuitable for any other form of pleading. Such irregular modes of pleading cannot be tolerated. And when it is remembered, that every defense, whether in law or in fact, can be set up in an answer, I have no hesitation in overruling the demurrers and pleas in these cases.

An order will be made to overrule the several demurrers and pleas with costs, and requiring the defendants to answer the complainant's bill in each case, on or before the rule day in December next.

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Morgan vs. Graham.

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MORGAN VS. GRAHAM.

1. A tax payer, who is liable to be assessed for the public taxes that will be necessary to pay the state debt and interest thereon, cannot maintain a private suit against the state officers to prevent them from executing and issuing bonds which the legislature has unconstitutionally authorized and required to be issued.
2. It is a general rule that an individual cannot maintain a private suit for an injury which he sustains in common with every other citizen.
3. The proper administration of the government in its several departments cannot be enforced by private actions brought by any tax payer or voter interested in the good government of the country.

Bill in Equity heard on motion for injunction.

*Mr. Miles Taylor*, for complainant.

*Mr. John A. Campbell*, for defendant.

BRADLEY, Circuit Justice. In this case a citizen of New York, who is a tax payer of Louisiana, files his bill to restrain the governor of the state and other state officers from executing and issuing certain state bonds which the legislature has, by a special act, authorized and required them to issue.

The grounds for the injunction are:

1. That the amendment of the state constitution, recently adopted, provides that prior to the 1st of January, 1890, the debt of the state shall not be so increased as to exceed twenty-five millions of dollars; and the state debt already exceeds that sum.

2. That the objects for which the bonds are to be issued are not such as the legislature has any constitutional authority to aid. The bonds are a donation to the New Orleans, Mobile and Chattanooga Railroad Company; and the legislature has no power to make such donations.

The bill assumes that a tax payer, who is liable to be assessed for the public taxes that will be necessary to pay the state debt and interest thereon, can maintain a private suit to prevent the state officers from executing and issuing bonds which the legislature has unconstitutionally authorized and required to be issued.

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**Case, Receiver, vs. Beauregard and others.**

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I do not think that such a suit can be maintained. It is a general rule that a man cannot maintain a private suit for an injury which he sustains in common with every other citizen. To allow such actions would promote endless litigation. Every dissatisfied person in the community would institute an action for his supposed grievance. Public officers would be subjected to intolerable prosecution. They would be so harassed thereby, that no competent person would be willing to enter upon any office of general importance. It is not in this way that the public officers are to be called in question for a dereliction of their official duties. The proper administration of the government in its several departments cannot be enforced by private actions brought by any tax payer or any voter interested in the good government of the country.

Without attempting to decide what remedy other than the force of public opinion, and liability to impeachment, may exist for the wrong which the complainant supposes is about to be committed; whether the bonds that may be issued will be void in the hands of the holders thereof; or whether the donee company may not hereafter be compelled to disgorge the money it may receive therefrom; it is sufficient to say in deciding this case that the complainant does not show any title to the relief which he seeks.

The injunction must be denied, and the bill dismissed with costs.

**NOTE.** — The proposition, that a particular individual cannot sue for a grievance which affects the entire public as well as himself, is sustained by the following cases: *Doolittle v. Supervisors*, 18 N. Y., 155; *Roosevelt v. Draper*, 28 N. Y., 818; *Hale v. Cushing*, 6 Metcalf, 425. But consult *People v. Westchester Co.*, 57 Barb., 877; *Hanlon v. Westchester Co.*, id., 883.

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**CASE, Receiver, vs. BEAUREGARD and others.**

1. The rule that trust property may be followed into whosoever hands it comes, with notice of the trust, does not apply to a case where an

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Case, Receiver, vs. Beauregard and others.

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officer of a bank, being a member of a partnership, without due security, lends to his firm money of the bank, which becomes mingled with the other property of the partnership.

2. Although it is generally true that partnership creditors are to be preferred in the distribution of the property of the partnership, and may follow it, if necessary, when one of the partners attempts to appropriate it to the payment of his individual debts; yet a mere simple contract creditor cannot maintain a suit for this purpose unless the partnership has in some manner gone into liquidation, or its property has been subjected to a trust for payment of debts — as where an assignment has been made in fact or in law.
8. Partnership creditors, merely as such, have no lien on the partnership property before obtaining judgment and execution; but can only be subrogated to the lien of the partners, and are therefore without remedy where such lien has been waived by them.

IN EQUITY. Hearing on bill, answers, replications and proofs.

*Mr. J. D. Rouse*, for complainant, who cited *Rogers v. Batchelor*, 12 Pet., 221; *United States v. Hack et al.*, 8 id., 271; *Claggett v. Kilbourne*, 1 Black., 846; La. Civ. Code, art. 2323 (2794); Story's Eq., § 1253; *Collins v. Hood*, 4 McLean, 186; *Innes v. Lansing*, 7 Paige, 588; 7 Cranch, 89; 2 Edw. Ch., 197; *Slawton v. Levy*; 1 Blatchf., 232.

*Messrs. John A. Campbell, H. C. Miller and L. E. Simonds*, for the N. O. & Carrollton Railroad Company, cited *Hogan v. Walker*, 14 How., 29; *Hoxie v. Carr*, 1 Sum., 173; *Ex parte Ruffin*, 6 Ves., 119; Story's Eq., § 1259.

*Mr. W. W. King*, for Fourth National Bank of New York.

BRADLEY, Circuit Justice. On the 13th of May, 1867, the First National Bank of New Orleans was closed, and upon an examination of its affairs, was found largely insolvent, and the plaintiff was appointed its receiver, under the 50th section of the National Banking Act. Amongst the assets were found a note of "G. T. Beauregard, Lessee," for \$40,000, dated Sept. 14, 1866, payable on demand, and a draft of T. P. May on A. C. Graham, of New York, for \$125,000, dated March 19, 1867, but not accepted. These documents had been credited to the bank account of "G. T. Beauregard, Lessee," which was, nev-

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ertheless, overdrawn \$72,000, and without these credits, would stand overdrawn \$237,000. T. P. May and A. C. Graham were largely interested in the bank, and had been its principal managers, Graham being president from July, 1865 to July, 1866, and May being president from the latter date to the failure of the bank. "G. T. Beauregard, Lessee," was a partnership firm consisting of G. T. Beauregard and the said T. P. May and A. C. Graham, the partnership being lessees, in the name of Beauregard, of the New Orleans & Carrollton Railroad (a horse-car railroad in the city). The lease was taken in April, 1866, and Beauregard was to manage the business, and May and Graham were to put in \$150,000 capital each. Their bank account, up to the time the bank failed, had credits, other than the note and bill above mentioned, to the amount of \$295,000, and debits to the amount of \$532,000. The credits were made up of deposits of the daily receipts of the road, and several cash payments of \$20,000 each, made by Graham. Of the debits, about \$35,000 was paid for real estate for the road, \$130,000 for reconstruction, \$155,000 for current expenses, \$85,000 for stables, car sheds, houses for employees, etc. The residue was for horses, cars, and other incidents to the railroad business. The rents and current expenses exceeded the receipts of the road.

It further appeared, that on the 8th of May, 1867, Graham assigned all his interest in the Carrollton railroad and firm of G. T. Beauregard, Lessee, to the Fourth National Bank of New York, to secure the payment of a claim of over \$50,000 against the First National Bank of New Orleans, for which Graham had become responsible. This assignment appears to have been made in good faith, and was recorded on the 15th of May. On the 14th of May, 1867, May being a defaulter to the government as assistant treasurer, for over a million of dollars, assigned to the United States, as security for his indebtedness, a large amount of property, including all his interest in the Carrollton railroad; and on the 16th he assigned Graham's interest also, pretending to own Graham's share, and to have a sufficient power of attorney for that purpose. But the weight

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of evidence is against this pretension, and the prior assignment of this share by Graham himself took the precedence.

On the 21st of August, 1867, the United States, by its agent, assigned all its interest in the Carrollton railroad and partnership of G. T. Beauregard, Lessee, to Bonneval, Hernandez & Binder, defendants in the cause. The assignment purported to be for two-thirds interest, and was guarantied clear of all debts except the indebtedness of May and Graham as lessees and copartners in the firm.

Bonneval and his associates, supposing themselves to be owners of two-thirds, and Beauregard retaining his one-third of the leased property, they together surrendered the old lease and all the partnership property to the New Orleans & Carrollton Railroad Company, and received therefor 4,000 shares, being an equal amount of capital stock of the said company to that which was then outstanding; thus becoming one-half owners of the whole property of the company, including the property by them put into the concern. The company assumed the debts of the firm of G. T. Beauregard, Lessee. This arrangement as to the issue of new stock was sanctioned by an act of the legislature.

The stock thus obtained by Beauregard, Bonneval and their associates has all been disposed of to other persons.

In view of these facts, the receiver of the bank contends, 1. That he is entitled to follow the property of G. T. Beauregard, Lessee, and subject it to a trust in favor of the bank, on the ground of its being the product of the money of the bank, wrongfully taken by the partners; 2. That, as a creditor of the partnership, he has a right to have the partnership property applied to the payment of the debts of the firm; and charges the defendants, namely, the present railroad company as newly organized, and Bonneval, Beauregard and their associates, as intermeddling with and taking possession of said property with full knowledge of the equities with which it is affected.

1. The first ground of relief, namely, that the property belongs to the bank, or is held in trust for the bank, because pur-

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chased with the money of the bank, is clearly untenable. Beauregard & Co. were engaged in business which required a considerable amount of funds, and became large borrowers of the bank. With the money thus obtained, and with other money derived from the proceeds of their business and other sources, they paid expenses, made repairs, bought cars, horses and other property, and found themselves at the end of the year largely behind. The bank is their creditor, and considering May's peculiar relations, it has cause to make a charge of official misconduct against him; but how does that entitle the bank to claim the property of the firm as its own? The identity of the property purchased or procured with the money of the bank cannot be ascertained. It was mingled with the other money of the firm, and the whole mass was used indiscriminately for all the purposes of the company. Can the receiver point to a single car or horse or lot of ground, and say, "This was purchased with the money of the bank?" Other creditors of the firm have become interested, and nothing but inextricable confusion would ensue if any such claim were allowed to prevail.

Where trust property is converted, and the proceeds can be identified, it may undoubtedly be followed by the *cestui que trusts*, and brought back to be appropriated to its original purposes. Money of a bank embezzled or misappropriated by its officers may undoubtedly be followed up in the same way, if the money itself, or its proceeds, can be identified, and no innocent person is injured by its recovery. But supposing the money now in question could be regarded as thus misappropriated, the impossibility of identifying it, and of doing justice to third parties, renders the application of the principle impracticable.

2. The position that May's assignment to the government was void as against the bank, on the ground of its being an assignment of partnership property to pay an individual debt, is equally untenable. The assignment was only of May's interest, which interest was individual property which he had a right to assign if his partners did not object. They had an equity to have the property subjected to the payment of the

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partnership debts, and to this equity the partnership creditors might be subrogated, unless the partners themselves waived it. The creditors, as such, had no lien on the property. They could only operate through the lien of the partners, and if this was given up, they were without remedy unless they could show fraud. No fraud is attempted to be shown in this assignment. It was made subject to the payment of the firm's debts, and with this condition the New Orleans and Carrollton Railroad Company received it, agreeing to discharge the debts of the firm, except such as had been assumed by Bonneval and his associates. Graham did not object to the assignment, except so far as it covered his own share, which he himself assigned to a creditor of the bank itself. Beauregard did not object — for he joined with the assignees of May's assignees in assigning the whole property of the firm to the Carrollton Railroad Company, with a stipulation that said company should pay all the debts of the firm. The case then amounts simply to this — a partnership firm assign their interest in the partnership property, subject to a stipulation for the payment of the partnership debts; and a creditor of the partnership files a bill against the assignees to obtain a direct appropriation of that property to the payment of the said debts. Such a bill certainly cannot be sustained, even at the suit of a judgment and execution creditor, unless it be shown that the assignment was intended to defraud the creditors of the firm. This cannot be pretended here, where the assignment itself contains a stipulation that the partnership creditors shall be paid.

But an insurmountable difficulty in the complainant's case is, that he is only a simple contract creditor, without any judgment, execution or specific lien to stand upon; and the partnership has not gone into liquidation. It is not enough for a person simply to allege that he is a creditor of another to enable him to pursue his debtor's property into the hands of others claiming to have purchased it; he must have a judgment and execution, or some lien upon it, or it must be subjected to a trust for creditors, or placed in a course of liquidation. If a statute subjects a particular fund to a particular class of claims,

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**Rosenfield vs. The Express Company.**

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it may be regarded as imposing a *trust* thereon ; or if the debtor makes an assignment for the benefit of creditors ; or if the law makes an assignment for him, as in case of bankruptcy ; in all such cases the creditors for whose benefit, as *cestui que trusts*, the fund is held in trust, may come into court without a judgment and ask for its administration in accordance with the trust. But without some such constituted trust or lien, a creditor has only the right to prosecute his claim in the ordinary courts of law and have it first adjudicated before he can pursue the property of his debtor by a direct proceeding.

The propriety of such a preliminary adjudication in this case is apparent from the fact that one of the controversies in the case is, whether the bank, of which the complainant is receiver, was a creditor of the firm to the amount claimed. The defendants allege that the amount of the bill of exchange, namely, \$125,000, at least, was the debt of May, and not the debt of the firm, being a portion of the capital which he was bound to put in, and being procured from the bank by him personally, and placed to the credit of the firm on his own account.

The bill must be dismissed with costs.

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**NOVEMBER TERM, 1871.**

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**ROSENFELD VS. THE EXPRESS COMPANY.**

1. A common carrier to whom goods are delivered for carriage cannot of his own motion set up title in another as a reason for not delivering the goods to the shipper or his consignee.
2. But when the carrier, upon demand made or suit brought by the real owner, delivers the goods to him, such delivery will be a defense to an action brought by the shipper or his consignee for the value of the goods.
3. When goods have been delivered by a carrier to a person other than the shipper or his consignee, not entitled to them, and the latter delivers the goods to the shipper or consignee, or pays him their value, in a suit against the carrier for the nondelivery of the goods, the shipper or consignee can only recover nominal damages.

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Rosenfield vs. The Express Company.

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The parties having filed a written stipulation waiving a jury, the cause was submitted to the court upon the issues of fact as well as of law.

*Mr. C. Roselius*, for plaintiff.

*Mr. A. de B. Hughes*, for defendant.

WOODS, Circuit Judge. The petition alleges that on the first day of September, 1865, at Alleytown, in the state of Texas, the plaintiff, being the owner of certain packages and cases of wool and cotton cards, intrusted the same to the defendant, to be transported to the city of New Orleans, there to be delivered to plaintiff or his order.

That on the 4th of September, 1865, at Houston, Texas, the plaintiff, being the owner of twenty-two other boxes of cotton cards, intrusted them through his agent, A. Cramer, to the defendant to be transported to New Orleans, and there delivered to the order of said Cramer.

That the defendant, notwithstanding its obligation to deliver said packages and cases to the plaintiff, has, although demand therefor has been made by plaintiff, neglected and refused to deliver the same to him, to his damage in the sum of twenty thousand, seven hundred and twenty dollars, for which amount, with interest and costs, the plaintiff demands payment.

The answer admits all the averments of the petition, except as to the value of the goods shipped, and sets up by way of defense :

1. That the defendant transported the goods duly to said city of New Orleans, and there delivered them to one G. Lewis, who was the owner of the same, and who had full authority to receive them.

2. That said goods were only worth \$4,500.

On the trial of the cause to maintain the issue on its part, defendant offered evidence tending to show that Gustave Lewis and L. Cowan were the owners of said goods, and that the same were delivered to said Lewis, and that he had authority to receive the same ; but the defendant did not offer to prove that the goods were delivered to Lewis upon the order of the plaintiff.

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Rosenfield vs. The Express Company.

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iff, or by his authority. The evidence so offered was objected to by the plaintiff, and the question of its admissibility was argued on both sides with ability and research.

The rule of law is claimed by the defendant to be this: If property committed to a common carrier has been delivered by it to the rightful owner who is other than the consignee, upon a suit brought by the latter, the title of the property may be inquired into, and the carrier is not concluded by the receipt or a bill of lading.

On the other hand, it is asserted by plaintiff that to contend that the common carrier can dispute the title of the party who employs him, being *pro hac vice*, the agent of the shipper, is to assume a ground altogether at variance with his confidential position and duties toward his principal, subversive of his trust, destructive of good faith and opposed to the policy and reason of the law, which protects and advances the interest of the employee.

After an examination of all the authorities cited on either side, I am satisfied that the rule upon which the question is based, is this:

In general, the carrier is not permitted to dispute the title of the person who delivers goods to him, and on his own motion, set up an adverse title in another. But if an adverse claim has been set up by the real owner, and suit either brought or threatened, or even demand made for the goods, and they have been delivered to him, the carrier may show these facts, and they will constitute a good defense to an action by the consignor.

In *Wilson v. Anderson*, 1 Barnwell & Adolphus, 450, LITTLEDALE, J., says: "If the suitor brought an action against the defendant as bailee, the latter might show that on being threatened by an action by a person who had title to the goods, he (the bailee) had delivered them."

In *King v. Richards*, 6 Wharton, 418, the court uses this language:

"It may be correct enough to hold that, when the real owner does not appear and assert his right, the carrier or bailee

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**Rosenfield vs. The Express Company.**

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shall not be permitted, of his own mere motion, to set up as a defense against his bailor such right for him; but it would be repugnant to every principle of honesty to say, that after the right owner has demanded the goods of the bailee, he shall not be permitted, in any action brought against him by the bailee of the goods, to defend against his claims by showing clearly and conclusively that the plaintiffs acquired the possession of the goods tortiously or feloniously, without having obtained any right thereto."

"As a general rule, a bailee cannot set up a right of property in a third person to defeat a recovery by his bailor, but this rule is subject to many exceptions; the defendant in such suit may show that the property has been taken from him by the process of law, or by a person having a paramount title. Nor are these the only exceptions. We are strongly disposed to think that the right of the true owner may be set up in all cases when upon his demand the property has in fact been delivered to him before the commencement of the suit."

Mr. Angell, in his treatise on the Laws of Carriers, sec. 385, says: "If the goods are by the real owner taken from the possession of the carrier, will it afford an excuse for nondelivery to the bailor? In general, the carrier is not permitted to dispute the title of the person who delivers the goods to him, and such is clearly the rule when an adverse claim is merely asserted by the carrier of his own mere motion."

Mr. Justice STORY, in his commentaries on Bailment, sec. 582, says: "Another excuse which may be asserted under certain circumstances is, when the goods are demanded or taken from the possession of the carrier by some person having a superior title to the property. In general, the carrier is not permitted to dispute the title of the person who delivers the goods to him, or to set up an adverse title to defeat his right of action growing out of his contract. And this is emphatically the rule when that adverse claim is not asserted by the superior claimant himself, but is merely asserted by the carrier of his own mere motion."

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Chancellor KENT, in his commentaries, vol. II, p. 567, lays down the rule thus: "The depositary is bound to restore the deposit upon demand to the bailor from whom he received it, unless another person appears to be the right owner. The bailee has a good defense against the bailor if the bailor had no valid title, and the bailee on demand delivers the goods to the rightful owner."

So, in *Shelbury v. Scotsford*, 1 Yelverton, 22, it was held that to a promise to redeliver a horse to the plaintiff, the defendant might plead that the horse was taken from him *vi et armis* by the true owner.

In *Sheridan v. The New Quay Co.*, 4 Common Bench, N. S., 619, Mr. Justice WILLES, delivering the judgment of the court, says: "The defendants were common carriers, and therefore bound to receive the goods for carriage. They could make no inquiry as to the ownership. They have not voluntarily raised the question; it was raised by the demand of the real owner before the defendants had parted with the goods. The same would have protected them against the real owner, if they had delivered the goods in pursuance of their employment without notice of his claim. It ought equally to protect them against the *pseudo* owner, from whom they could not refuse to receive the goods, in the present event of the real owner claiming the goods, and their being given up to him.

This subject is discussed, and the rule as above stated recognized in the following cases: *Floyd v. Bovard*, 6 Watts & Sergeant, 75; *Harker v. Derent*, 9 Gill, 7; *Lowremore v. Berry*, 19 Ala., 130; *Blevin v. H. R. Q. Co.*, 36 N. Y., 403; Fisher's Digest, title "Bailment," vol. 1, p. 570; *Edson v. Wester*, 7 Cowen, 280.

The same rule seems to have been adopted by the civil code of this state. Secs. 2949 and 2959 of the revised code of 1870, declare that "the depositary must restore the thing deposited only to him who delivered it, or in whose name the deposit was made, or who was pointed out to receive it."

"He cannot require him who made the deposit to prove that he was the owner of the thing, yet if he discovers that the thing

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was stolen, and who the owner of it is, he must give him notice of the deposit, requiring him to claim it within due time. If the owner receiving due notice neglects to claim the deposit, the depositary is fully exonerated in returning it to the person from whom he received it."

Counsel for both parties admit that the jurisprudence of this state and the civil law is in harmony with the common law upon the question under consideration.

Taking the rule as I have stated it to be the law settled by the authorities, should the evidence offered by the defendant and objected to by plaintiff be admitted? The evidence is of course offered to sustain the defense as set up in the answer. This, as stated by defendant, itself does not set up adverse title in another, and a demand for the property by such adverse claimant, but construing the answer most strongly against the pleader, the defense seems to be a voluntary assertion of title in another by the common carrier, and a voluntary delivery of the property, without any demand or claim whatever of title by the party to whom it was delivered.

The answer, according to the authorities cited, is bad, on general demurrer, and evidence for the purpose of sustaining it must be excluded, for if defendant proved precisely what it has alleged, it would avail it nothing.

The defendant then being without proof to sustain the main defense on which it relied, there must be a finding and judgment for the plaintiff for the amount of damage actually sustained by him as the result of the wrongful act of the defendant.

The law gives actual compensation for the loss actually sustained.

Thus, if by the breach of contract by the defendant, the plaintiff entirely lost his goods, the measure of his damages would be the value of the goods. But, suppose in violation of its duty and contract, the defendant had delivered the plaintiff's goods to a person not entitled to them, and that person, on demand of plaintiff had, at once and without costs and charges, turned them over to the plaintiff, no court or jury

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would give him damages for the full value of the goods. His damages would be merely nominal, and he would be awarded nominal damages.

"Another species of property," says Blackstone, Com. II, ch. 29, p. 438, "acquired and lost by suit and judgment at law, is that of damages given to a man by a jury as a compensation and satisfaction for some injury sustained."

"Every one," says Lord HOLT, "shall recover damages in proportion to the prejudice which he hath sustained." *Ferrer v. Beale*, 1 La., Raymond, 692.

Damages — "*Damna* in the common law," says Lord COKE, "hath a special signification, for the recompense that is given by the jury to the plaintiff for the wrong the defendant hath done unto him." Co. Lit., 257a.

In this case the evidence clearly establishes, that after the delivery of the goods named in the petition had been made by the defendant to the said G. Lewis, Lewis accounted for the proceeds to the plaintiff to his entire satisfaction. This is proven by the testimony of two witnesses, and is not successfully contradicted.

After the plaintiff had thus received the proceeds of the sale, with what show of justice can this court award him damages against the defendant for their full value? He has, in effect, received his goods from the person to whom the express company delivered them. He can only ask this court to give him compensation for the defendant's breach of contract—to *recompense* him—to make him whole—to put him in the same plight as if the express company had performed its contract by the delivery of the goods to him. The goods having been accounted for to him to his satisfaction, his damage is only nominal. Nominal damages will compensate him, and the court awards him nominal damages.

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Johnsen vs. Fassman and others.

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JOHNSEN VS. FASSMAN and others.

1. The fact of abandonment must result from the intention of the patentee expressly declared or clearly indicated by his acts.
2. The issue of letters patent by the patent office is *prima facie* evidence that there has been no voluntary abandonment of his invention to the public by the inventor, either before or after his application for letters patent.
3. The rule to be deduced from the authorities on the question of abandonment after application is, that after the issue of letters patent, the abandonment must be shown to be positive, actual and intentional by some act or declaration of the inventor, or by such gross laches as indicate unmistakably an intention to abandon the invention to the public.
4. Where nothing was relied upon to defeat complainant's patent but the inventor's delay in prosecuting his application for the patent, his application having been finally rejected by the commissioner, April 11, 1857, and not appealed until August 16, 1866, during four years of which time the patent office was closed to him by reason of his residence in a state that was in rebellion: *Held*, that no direct or implied abandonment was shown.
5. A patent relates back to the date of the application; and patents granted to other inventors during the pendency of such application, so far as they cover the same invention, are void, and are no protection to an infringer.
6. A cotton-bale tie, in which the lower edges of the transverse slots are provided with lips or flanges projecting downward at an angle with the plane of the buckle, to prevent the end of the band from slipping, *held* to be infringed by a tie in which the slots are provided with toothed or serrated edges for the same purpose.

This was a suit in equity, brought against E. Victor Fassman and others by Charles G. Johnsen, for an alleged infringement of letters patent for an improvement in cotton-bale ties, granted to Charles Swett, October 23, 1866. The patented invention and the alleged infringement are described in the opinion. The grounds of defense were, first, invalidity of complainant's patent by reason of the alleged abandonment of the invention, after filing of the application for the patent and prior to the grant thereof; second, noninfringement.

*Messrs. C. Roselius, A. Phillips and S. S. Fisher*, for complainant.

*Messrs. John Finney and H. C. Miller*, for defendants.

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**Johnsen vs. Fassman and others.**

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WOODS, Circuit Judge. This cause is submitted for final decree upon the pleadings and evidence.

The object of the suit is to enjoin defendants from infringing upon an improvement in cotton-bale ties, which the complainant avers was patented to Charles Swett, October 23, 1866, and by whom all rights under said patent have been assigned to complainant.

The claim of Swett's patent was for "a new and improved fastening block for securing metallic bands or hoops to cotton-bales," described thus: "A block of suitable size, either made by casting or stamping out of metal. In this block are formed two slots or holes parallel with each other across the block; the length of the slots is to be equal to the width of the hoops to be used. From the corner and inner edges of the slots, projections extend out obliquely beneath said slots and nearly covering their lower openings."

After applying the bands as described in the specification, "then, when the bale is removed from the press, the elasticity of the cotton presses firmly against the ends of the hoops and prevents them being withdrawn."

The answers of defendants allege, by way of defense, that long before the date of the patent of Swett and of his assignment to complainant, Swett had abandoned his invention. They aver that the application of Swett for letters patent was made in the year 1856, and was rejected in the same year, and again, upon an amendment of specifications, was finally rejected by the commissioner of patents, April 11, 1857, for want of novelty; that Swett acquiesced in the decision of the commissioner from that date until August, 1866; that from the date of the rejection of his application in April, 1857, down to August, 1866, Swett took no steps whatever to obtain letters patent for his said invention, but acquiesced entirely in the rejection of his application, and abandoned his pretension to a patentable invention; and that in the meantime many different forms of blocks, plates and buckles with slots for the insertion of a hoop or band, and various devices to hold and fasten the ends of the bands together, with the aid of the expansive

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pressure of the cotton in the bale, were in notorious use ; that on April 18, 1865, letters patent, embodying those general features, were issued to defendant E. Victor Fassman, and were reissued on an amended specification on December 11, 1866, relating back, however, to the said April 18, 1865. They allege that an appeal to the supreme court of the District of Columbia was taken by Swett ; but aver that it was not until the year 1866, long after the application of Swett had been abandoned, and that the effect of the decree of that court was merely to overrule the decision of the commissioner of patents, rejecting said application for want of novelty.

The answer also denies any infringement of the complainant's patent by the defendants, or any of them, so that the only questions presented by the pleadings are :

1. Did Swett abandon his invention before the issue of his letters patent? And,

2. Have the defendants infringed?

The facts as to the delay between the application of Swett, April 23, 1856, and the issue of letters patent to him, Oct. 23, 1866, are correctly stated in the answer. Defendants rely upon these facts as proof of abandonment, and offer no other evidence. There is no proof of actual abandonment. Are these facts sufficient evidence to support the defense of abandonment? The fact of abandonment must result from the intention of the patentee expressly declared or clearly indicated by his acts.

In the case of *Adams v. Jones*, 1 Fisher, 580, Mr. Justice GRIER said : " By the application filed in the patent office the inventor makes a full disclosure of his invention, and gives public notice of his claim for a patent. It is conclusive evidence that the inventor does not intend to abandon it to the public. The delays afterward interposed, either by the mistakes of the public officers or the delays of courts, where gross laches cannot be imputed to the applicant, cannot affect his right."

In the case of *Dental Vulcanite Company v. Wetherbee*, 3 Fisher. 87, Mr. Justice CLIFFORD says : " The next objection to be

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noticed is that the inventor abandoned his invention, because his application for a patent was made April 12, 1855; was rejected Feb. 6, 1856; and because he did not appeal at all or make any new application until March 25, 1864. Actual abandonment is not satisfactorily proved, and it is not possible to hold that any use of the invention, without the consent of the inventor, while his application for a patent was pending in the patent office, can defeat the operation of the letters patent after they are duly granted. Such delays are sufficiently onerous to a meritorious inventor, if his patent is allowed to have full operation after it is granted; but it would be very great injustice to hold that any delay, which the inventor could not prevent, should, under any circumstances, affect the validity of his patent."

So in the case of *Rich v. Lippincott*, 2 Fisher, 1, Mr. Justice GRIER charged the jury as follows: "If you find that the application in 1836, renewed in 1837, was for the same subject matter now patented, and if such application, was not withdrawn by Fitzgerald, but the delay was caused by the conduct of the commissioner of patents in refusing to grant the patent for the same invention since patented, then Fitzgerald should not be considered to have abandoned his invention to the public, unless he abandoned it before 1836, which is not contended." In this case the patent was issued in 1843.

In *McMillin v. Barclay* (5 Fisher, 189), the question is asked: "Upon what reasoning should the inventor be regarded as having given up his invention to the public, merely because a public officer has repeatedly denied his application for a patent, and the recognition of his right has thus been denied for years, when he was powerless to prevent it?"

The issue of the letters patent by the patent office is *prima facie* evidence that there has been no voluntary abandonment of his invention to the public by the inventor, either before or after his application for letters patent.

The rule to be deduced from the authorities on the question of abandonment after application for letters patent we think to be this, that after the issue of letters patent, the abandonment

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must be shown to be positive, actual and intentional by some act or declaration of the inventor, or by such gross laches as indicate unmistakably an intention to abandon the invention to the public. Nothing is relied on in this case but the delay of the inventor in taking his appeal from the decision of the commissioner of patents to the supreme court of the district. The application of Swett was finally rejected, on amended specifications, April 11, 1857. He appealed on August 16, 1866. Here was a delay of nine years and four months. In the case of *The Dental Vulcanite Company v. Wetherbee, supra*, there was an interval of eight years between the rejection by the patent office and the appeal. That was not considered by the distinguished judge who decided that case as sufficient evidence of abandonment. But in the case on trial, if we were disposed to hold that a delay of nine years and over was sufficient evidence of abandonment unless accounted for, there is a fact disclosed by the record which would relieve Swett of the imputation of gross laches — that is, that he was a citizen of one of the states in revolt during the late rebellion — to wit, the state of Mississippi — so that for four of the nine years of the interval between the rejection of his application and his appeal, the patent office was closed to him. Bearing this fact in mind, we are clear that no direct or implied abandonment is shown by the record in this case.

The fact that, between the date of the application of Swett and the issue of his letters patent, other letters patent were issued to other inventors for substantially the same invention, gives them no right to infringe on Swett's patent. His patent relates back to the date of his application; any patent for the same invention granted to another inventor, while his previous application was pending, so far as it covers Swett's invention, is void, and is no protection to an infringer.

The next and only other question presented for determination is the question of infringement. An inspection of the models of the buckles used by the defendants clearly shows that they all embody the principle and infringe on the Swett

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patent. The only tie about which I have had any doubt is known as the alligator tie. This tie consists in a buckle, the opening or slot of which has serrated or toothed edges, which, when the pressure is removed from the bale, prevents the slipping of the end of the tie. There are no lips or flanges turned down at an angle with the plane of the buckle, as in the Swett patent. The serrated edges in the alligator tie are substituted for the flange in the Swett tie.

The application of Swett was first rejected by the patent office on the ground of want of novelty—the commissioner deciding that it was substantially identical in form and effect with the common sliding clasps or buckles used on hat bands, suspenders, harness, etc. Mr. Chief Justice CARTER, in his opinion reversing the decision of the commissioner, says: “Inspection of the device satisfies my judgment that this conclusion is erroneous. The contrivance is neither buckle nor sliding clasp, although performing more or less the office of each, and, for the purpose designed, more effectual than either. The clasp and buckle are both without the flanges that constitute the distinguishing excellence, enabling it to hold the contents of the bale by the very process exerted in escape. It embraces, also, the advantage undisclosed in either clasp or buckle—viz: tying itself up to its work through the agency of force exerted against it, a function employed by neither clasp nor buckle.

The teeth in the alligator tie perform the same function as the flanges in the Swett tie, and on the same principle, viz: “they hold the contents of the bale by the very process exerted in escape; it ties itself up to its work through the agency of force exerted against it.” It is the same device acting on the same principle, performing the same function, only modified in form. We think it to be an infringement on the Swett patent, now the property of complainant.

Let there be a decree for complainant, enjoining defendants as prayed in the bill, and let the case be referred to a master to take an account of profits.

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Labitut vs. Prewett.

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**LABITUT VS. PREWETT.**

1. An executor may bring a bill to protect the property of the estate, of which he is executor, from sale on execution issued on a judgment against himself personally, without joining the legatees or other persons entitled to the estate after payment of the debts.
2. Under the Code of Louisiana a particular legacy is to be discharged in preference to all others out of the funds of the succession; and in default of funds, it is to be paid as long as the estate is administered by executors, indifferently out of the personal and real estate. It becomes a charge upon the whole estate and descends to the heir as a personal debt when he takes possession.
3. When a person takes possession of the property of a succession as executor, and not as heir or universal legatee, the property is first subject to the payment of the debts and legacies of the succession.
4. A creditor of a succession who permits the heir to take unconditional control of an estate, without causing it to be administered, loses the right to pursue the property of the succession as distinct from that of the heir.
5. The remedies of legatees by a personal action against the heir, or by separation of patrimony, have no application when the heir as heir is not in possession of the estate.
6. The possession of an executor as executor under the appointment of the probate court, even when the executor is also heir or universal legatee, relieves the creditors and legatees of the succession from the necessity of resorting to such proceedings to protect their rights.
7. In order to vest the property of a succession in a universal legatee, so as to make him the debtor of the legatees and creditors of the succession, there must be some deliberate act on his part showing a purpose to take possession as universal legatee.

This was a Bill in Equity. The case was heard upon demurrer to the bill for want of equity, and upon a motion to continue a preliminary injunction.

*Mr. J. Ad. Rosier*, for complainant.

*Mr. Edw. Phillips*, for defendant.

WOODS, Circuit Judge. The averments of the bill are, that Zenon Porche, of Pointe Coupee parish, Louisiana, was in his lifetime seized, as of an estate in fee simple, of a certain plantation situate in said parish. That having departed this life, his will was, on the 21st of August, 1861, duly probated in

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the probate court of said parish, whereby he bequeathed a large number of legacies to legatees therein named, amounting in the aggregate to \$100,000, and constituted and nominated Evariste Bara his universal legatee and testamentary executor. That said Bara accepted said trust, and was duly confirmed and qualified as such executor, and entered upon the discharge of his duties, took possession of said plantation and the farming implements and utensils of husbandry, but before he could pay the sums of money devised by the will of Porche, he also, to wit, in 1863, departed this life.

That said Bara left a will, which was duly probated on the 15th day of June, 1863, in the court having probate jurisdiction on said parish of Pointe Coupee.

By his said will, Bara appointed the complainant, Jules Labitut, his universal legatee and testamentary executor. In said will the said universal legacy was specially devised to the said Labitut, with the charge and on the condition that he should pay and execute all the legacies bequeathed by the will of said Porche.

That said Labitut was duly appointed and confirmed as testamentary executor of the will of said Porche, and also of the will of said Bara, and was duly qualified, and letters testamentary on both of said wills were delivered to him.

That said legacies have not been paid or discharged, and in this respect said wills have not been executed, and said Labitut still remains such executor. That neither Porche nor Bara ever married, and neither of them left lawful descendants or ascendants.

That on the 29th day of November, 1861, the defendant Prewett recovered on the law side of this court a judgment against Labitut, in his individual capacity, for \$1,701 and interest, and the said defendant, the Northern Bank of Kentucky, on the first day of January, 1862, recovered a judgment against said Labitut, also in his individual capacity, for \$6,253-50, with interest; that the causes of action on which said judgments were founded were individual and entirely disconnected from both said estates.

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That writs of *feri facias* were issued on said judgments on the 21st day of January, 1869, and were levied by the United States marshal on said plantation and its appurtenances, the property of said estates. That the successions of Porche and Bara have never been fully administered, but are still in the course of administration by said Labitut as executor, and are still subject to the orders of the probate court.

That said Labitut has never been put in possession of said successions or either of them in the capacity of universal legatee, but was in possession of said property at the time of its seizure solely in his representative capacity as executor, holding the same under the orders of said probate court for the purpose of executing the will.

That Labitut is heavily in debt and unable, out of his own means, to discharge said legacies, and the only mode by which said legatees can ever expect to be paid their legacies is out of the property seized by the marshal as aforesaid.

That the United States marshal had given notice that by virtue of *pluries* writs of *feri facias* issued in said judgments, he would proceed to sell said plantation with the stock and appurtenances thereof.

The bill is filed by Jules Labitut, the said executor, and by a part of the legatees mentioned in the will of Zenon Porche, whose legacies amount in the aggregate to \$56,000. The other legatees are not parties. The bill prays for an injunction restraining the marshal from proceeding to sell said property, and for other special and general relief.

In July last a preliminary injunction was granted. The cause now comes on for hearing upon a motion to continue the preliminary injunction and upon a demurrer to the bill of complaint.

The ground of demurrer is that the bill does not state such a case as entitles the complainant to the relief prayed.

In the argument, it is alleged as a fatal defect of the bill, that a part only of the legatees named in the will of Porche, and not all, are made parties complainant. It is said that were there to be a decree in favor of the defendants, the other lega-

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tees who are not parties could file another bill and take out another injunction, and so keep up an endless litigation.

There would be much force in this objection were it not for the fact that the testamentary executor is a party complainant, and he may well be said to represent the interest of all the legatees. In all cases of bills by creditors and legatees against the executor or administrator, the persons entitled to the personal assets of a deceased debtor or testator after payment of the debts or legacies, are not deemed necessary parties, though interested, to contest the demands of creditors and legatees. *Dandridge v. Washington*, 2 Peters, 377.

Courts of equity do not require that all persons having an interest in the subject matter should under all circumstances be before the court as parties. On the contrary, there are cases in which certain parties before the court are entitled to be deemed the full representatives of all other persons, at least so far as to bind their interests under the decree, although they are not or cannot be made parties. Story's Eq. Pl., § 142; Calvert on Parties, ch. 1. sec. 2, p. 20; *Van Vechten v. Terry*, 2 Johns. Ch., 197.

It may be laid down as a general rule, that where any persons are made trustees for the payment of debts and legacies, they may sustain a suit either as plaintiffs or as defendants, without bringing before the court the creditors or legatees for whom they are trustees. Story's Eq. Pl., § 150.

On these authorities we reach the conclusion that while the legatees under the will of Porche may be proper, they are not necessary parties to this bill; that they are fully represented by the testamentary testator; and whether parties or not, would be bound by the decree in the case. The objection that the bill is defective for want of necessary parties is therefore untenable.

In reply to the objection that the statements of the bill are too vague and uncertain, it is sufficient to say that if all the facts averred are true, they make out a case, if the law as claimed by the complainants is found for them.

We must give a reasonable construction to the averments of

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the bill. When it is alleged that said legacies have not been paid or discharged, that is a sufficient averment that the entire legacies, or a substantial portion of them, remain unpaid, especially when considered in connection with the averment that Labitut is heavily in debt and unable to pay said legacies out of his own means, and that the only means out of which said legacies can be paid is the property seized by the marshal.

The main ground on which defendants rest the demurrer and resist the motion for injunction is this: That by virtue of the said wills and the subsequent proceedings of Labitut, the property of the succession of Porche has become his individual property, and the legatees his individual creditors, and that they have no higher or better right to the proceeds of that property than any other creditor of Labitut.

On this hearing we must take the averments of the bill to be true. They are sworn to and are not put in issue either by answer or affidavit.

One of these averments is that Labitut was never in possession of said succession as universal legatee, but in his representative capacity as executor, holding under the order of the probate court. This we must take to be true, unless the other facts stated in the bill and the wills of Porche and Bara, which are made exhibits, show that such is not in fact the tenure by which Labitut holds, but that in fact he holds as universal legatee, whereby the property becomes liable for his individual debts, before the payment of the legacies.

At common law the testator's effects could not be taken in execution for the executor's debts. *McLeod v. Drummond*, 17 Ves., jr., 168; *Farr v. Newman*, 4 Durnford & East, 624.

So under the Code of Louisiana, the general principle is laid down that a particular legacy is to be discharged in preference to all others, out of the funds of the succession, and in default of funds, it is to be paid, as long as the estate is administered by executors, indifferently out of the personal and real estate, and becomes a charge on the whole estate, and descends to the heir as a personal debt when he takes possession. *Duke of Richmond v. Milne's Ex'r*, 17 La., 312.

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The question, therefore, recurs: Was the possession of Labitut a possession as universal legatee or as executor; did he take the property as legatee and become the debtor of the legatees named in the will of Porche, or did he take as executor and trustee, holding the estate to be administered for the benefit of the legatees?

The case of *Bird v. The Succession of Mrs. Jones*, 5 Annual, 643, is relied upon by complainants as decisive of this case.

The case was this: Mrs. Jones died, leaving a will in which she declared, (1) I desire that all my just debts be paid, and if anything is left, I desire it to be disposed of as follows: (2) I give and bequeath to Burwell Henderson Jones, all the property which, by law, I have a right to dispose of, and make him my universal legatee. (3) I appoint Burwell Henderson Jones my executor, and dispense him from giving security therefor, and give him seizure of my estate, and request him to see that the intentions herein expressed be carried out. On December 14, 1869, a judgment was rendered in a court having probate jurisdiction, sustaining the will, ordering its execution, and appointing Jones executor. In February, 1849, one Grimes obtained a judgment against Jones and recorded it. On December 31, 1849, he caused a *fiery facias* to be levied on certain lands and slaves of the estate of the said testatrix, Eliza Jones.

On the eve of the sale various creditors of her estate presented their petitions opposing the seizure and sale, on the ground that the property seized was the property of the succession, and not of Jones, the judgment debtor.

In his answer as testamentary executor, Jones admits his appointment, that he had made an inventory and taken possession as executor, and that he holds the property as such with the intention of paying the debts of the succession, and well knowing that only the residue after such payment belonged to him.

It seems that on the 18th of December, 1849, Jones, in his individual capacity, had entered into a contract with the forced heirs of Mrs. Jones, her father and mother, by which he conveyed to them a number of slaves belonging to the estate in

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satisfaction of their share, and they conveyed to him the residue of the estate.

In support of the right of the creditors of Jones to enforce their execution on the property of the succession, it was argued that by the contract between Jones and the forced heirs, there was an acceptance by him as universal legatee; that from the date of the acceptance the property in controversy became his, and must by legal fiction be considered as having vested in him upon the death of the testatrix, and therefore became subject to Grimes' judicial mortgage and liable to seizure by the legatee's creditors. That only three months were allowed to the creditors of the testatrix, from the opening of the succession or the acceptance by the heirs, to petition for a separation of patrimony, to record their claims and preserve their privilege. That by allowing that period to elapse they had consented to accept the forced heirs and the universal legatee as their debtors.

The court, in reply to these arguments, says: "These propositions would be difficult to answer if Jones had in fact taken possession of the estate as legatee more than three months before the creditors of the succession acted. But it was in the capacity of executor that Jones obtained possession of the property belonging to the succession. By accepting that office he was clothed with a fiduciary capacity, and became the trustee of all persons interested in the succession according to the instructions of the will which he undertook to execute. In assuming the execution of the will, he undertook the trust of first paying all the debts of the succession. It was only the residuum after that payment, and subject to the rights of the forced heirs, which were bequeathed to Jones."

"The right of the creditors of a succession to be paid out of its assets in preference to the creditors of the heir rests upon a clear principle of natural justice. In the hands of the deceased her property was liable for her debts; upon her death it should pass to the heir with the same burdens. The creditors of the heir ought not to have a greater right in it than the heir himself."

And so the court concludes: "There is no equity in the

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attempt of Jones' creditors to divert the property of Mrs. Jones to the payment of his debts at the expense of her creditors, nor does the law in our opinion, when reasonably interpreted, sanction such an injustice."

It is difficult to distinguish this case from the case now on hearing.

The attempt is made, however, but it is based on the assumption that Labitut took possession of the estate as universal legatee, and not as executor. This assumption is not borne out by the record. Labitut alleges that he did not hold possession of the estate as universal legatee, but that his possession was solely that of executor, holding the property under the order of the probate court for the purpose of executing the will. There is no circumstance disclosed by the record showing a different state of fact, or from which a different tenure of the property can be inferred.

The doctrine is not disputed that a creditor who permits the heir to take unconditional control of the estate without causing it to be administered, loses the right to pursue the property of the succession as distinct from that of the heir.

But these legatees who stand in no worse plight than creditors would, had there been any, have not been guilty of such negligence. If the bill be true, Labitut has not taken these estates as universal legatee, without administration. On the contrary he holds by virtue of his administration, by virtue of his appointment and confirmation by the probate court, to which he has given bond and to which he is responsible.

The remedies of legatees by a personal action against the heir, or by separation of patrimony, can surely have no application, when the heir as heir is not in possession of the estate. The possession of the executor as executor under the appointment of the probate court, even when the executor is also heir or universal legatee, must relieve the creditors and legatees of the necessity of resorting to these proceedings to protect their rights. They do not seem to be at all applicable to such a case. In *Bird v. Jones*, *supra*, the court says: "The very term separation of patrimony supposes the case of possession taken by

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Labitut vs. Prewett.

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the heir. Its object, in the language of the Code, is to prevent property out of which a particular class of creditors have a right to be paid from being confounded with other property, and by that means made liable to another class of creditors. But how can this confusion take place when the property of the succession is not in possession of the heir, but of a trustee representing the creditors?"

In order to vest the succession in a universal legatee, so as to make him the debtor of the legatees and creditors of the succession, there must be some deliberate act on his part showing a purpose to take possession as legatee. "Nobody can be compelled to accept a succession in whatever manner it may have fallen to his share." Code of 1808, p. 160, art. 71.

And where a testamentary executor takes possession as such under the appointment, and by the authority of the probate court, the fact that he is also universal legatee does not change the character of his possession.

When one who is executor and universal legatee under a will takes possession of the estate as executor, he will not be regarded as having possession in his capacity of legatee; nor can he, without judicial authority, change the nature of his possession. *Bird v. Succession of Jones*, 5 Ann., 643.

Under the averments of the bill I am constrained by these authorities to decide that Labitut holds possession of the successions of Porche and Bara as trustee, and not in his individual right; that he is bound to administer the successions so as to execute the provisions of the wills of the testators; that this trust property cannot be taken from his hands and diverted by his creditors from the objects of the bounty of the testators to the payment of the individual debts of the trustee.

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McComb and another vs. Brodie.

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McCOMB and another vs. BRODIE.

1. There may be a claim for two inventions in the same patent if they both relate to the same machine or structure; and an action can be sustained for the infringement of either one of these separate inventions when claimed as separate and distinct in their character.
2. Where plaintiff's patent covered three different features of invention, but suit was brought on one claim only, the jury were instructed to consider the case precisely as if the patent covered that claim alone.
3. The third claim of Cook's patent of March 2, 1858, for cotton-bale tie, construed to be for the right to use an open slot cut in a buckle, which without the cut would be a closed buckle, so as to allow the end of the tie or hoop to be slipped sidewise underneath the bar through which the slot is cut.
4. If a party uses the open slot for passing the end of a cotton tie sidewise under the slotted bar, it makes no difference whether such end is in the form of a loop or not, if the result attained is that the end of the tie has been "slipped sidewise through the slot underneath the bar, so as to effect the fastening with greater rapidity than by passing the tie through endwise."
5. A man cannot have two patents for the same process because for different purposes.
6. When the means, devices and organization are patented, the patentee is entitled to the exclusive use of this mechanical organization, device or means, for all the uses and purposes to which it can be applied, without regard to the purposes to which he supposed, originally, it was most applicable.
7. To constitute infringement the contrivances must be substantially identical, and that is substantial identity which comprehends the application of the principle of the invention.
8. If a party adopts a different mode of carrying the same principle into effect, and the principle admits of different forms, there is an identity of principle though not of mode; and it makes no difference what additions to or modification of a patentee's invention a defendant may have made; if he has taken what belongs to the patentee, he has infringed, although with his improvement the original machine or device may be much more useful.
9. All modes, however changed in form, but which act on the same principle and effect the same end, are within the patent; otherwise a patent might be avoided by any one who possessed ordinary mechanical skill.
10. The rule of damages at law is not what the defendant has made, or what he might have made, but it is the loss sustained by the plaintiff by reason of the infringement.

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**McComb and another vs. Brodie.**

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11. If plaintiff was ready to supply the market with his patented goods, and his business was hindered or interfered with by the competition of defendant, plaintiff's damage will be the amount or profit which he has lost by reason of such interference.
12. If a plaintiff neglects to prove that his patented article was stamped, or that he gave to the infringer the notice required by section 38 of the patent act of 1870, a jury cannot award him more than nominal damages.

A suit at law upon letters patent for improvement on metallic ties for cotton bales, granted to Frederick Cook, March 2, 1858. Mary Francis McComb and James Jennings McComb, plaintiffs; and George Brodie, defendant.

The case was tried by WOODS, Circuit Judge, and a jury.

*Messrs. S. S. Fisher, J. A. Campbell, C. Roselius and W. M. Randolph*, for plaintiffs:

*Messrs. T. J. Semmes and Robert Mott*, for defendants:

WOODS, Circuit Judge, charged the jury as follows:

The plaintiffs, Mary Frances McComb and her husband, James J. McComb, who sues for himself and to assist his said wife, allege that Frederic Cook, March 2, 1858, obtained from the United States Patent Office letters patent of that date for an improvement in metallic ties for cotton bales, issued to him as the original and first inventor; and that said Cook, for a legal consideration, afterward assigned to the plaintiff, Mary Frances McComb, the full and exclusive right to his said improvement and invention covered by said patent, whereby, under the laws of the state of Louisiana, both the said plaintiffs have the same rights and to the same extent, that were granted to said Cook; that they have, since said assignment, and the said Cook had before said assignment and immediately after the issuance of the patent, put upon the market and sold to the public said invention and ties made on the principle described in said patent; and that the defendant, George Brodie, knowing the rights of plaintiffs, and that they were making large profits by the sale of cotton ties made according to the plan covered by said patent, and with the purpose of invading the

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rights of said plaintiffs, did, in the year 1868, and after the date of said patent and the assignment, make and use, and vend to others, to be used, the invention aforesaid, without license from plaintiffs, or either of them, to the amount of two hundred tons of cotton ties, to the damage of plaintiffs in the sum of ten thousand dollars.

The answer of defendant to this, the plaintiff's cause of action, is substantially a denial of the averment that he has in any manner violated the rights of petitioners by the manufacture, use, or sale of ties made on the mechanical principles secured by said letters patent, or that he has at any time made, used, or vended to others to be used, the invention described in the letters patent aforesaid.

The defendant, by way of reconvention, also alleges, that on the 22d of March, 1859, he obtained from the United States Patent Office letters patent of that date for an improvement in cotton bale ties, which said letters patent were surrendered April 27, 1869, and on that date a patent with amended specifications and claims was reissued to him; and that since April 27, 1869, plaintiffs have infringed on his said invention, by making, using, and vending to others to be used, large numbers of said ties, made according to the plan patented by him, and without his license, to his damage four hundred thousand dollars, for which amount he, assuming the character of plaintiff in reconvention, prays judgment.

Under the practice in this state, the denial of plaintiff of the reconventional demand of defendant is presumed, and no formal written denial is required.

This abstract of the pleadings presents the issues of fact submitted for your decision.

Your first inquiry will therefore be, Has the defendant invaded the rights of the plaintiffs by making, using or vending, without their permission, the device or contrivance secured to them by the letters patent issued to Cook?

To maintain the issue on their part, plaintiffs introduce the letters patent granted to Cook, with the accompanying model, draughts, and schedule, showing the claims of the patentee

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and the assignment to them of all the rights secured by said letters patent.

Whatever invention, therefore, Cook had secured to him by his patent, is now the property of plaintiffs.

The schedule referred to in Cook's patent and making part of the same, and which is in evidence, discloses that the patent was intended to cover three separate and distinct inventions:

1. A friction buckle or clasp, represented by figs. 1, 2 and 3, showing the different views of it, for attaching the ends of iron ties or hoops for fastening cotton bales or other packages.

2. The manner of looping the ends of the iron ties or hoops into a buckle, by the form of which they are prevented from slipping by friction when the strain of the expansion of the bale comes on the ties.

3. The slot cut through one bar of the clasp or buckle, as shown in the diagram, which enables the end of the tie or hoop to be slipped sidewise underneath the bar in the clasp or buckle, so as to effect the fastening with greater rapidity than by passing the end of the tie through endwise.

On this trial, plaintiffs say that they complain only of the infringement of the device last above named.

"Independent things, separable and separate things where any combination arises, provided they are cognate, relate to the same invention and have relation to the same subject matter, the same object to be accomplished; undoubtedly these separate claims can be made in the same patent." *Densmore v. Schofield*, 4 Fisher, 154.

There can be no question that there may be a claim for two inventions in the same patent, if they both relate to the same machine or structure, and an action can be sustained for the infringement of either one or the other of these separate inventions, when claimed as separate and distinct in their character. *Lee v. Blandy*, 2 Fisher, 92; *Electric Telegraph Company v. Brett & Little*, 4 Law and Equity Reports, 347; Norman on Patents, 108, 109.

So, the patent of Cook covering, as we have said, three separate and distinct inventions, and these inventions all being

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cognate and relating to the same subject matter, the plaintiffs may well prosecute for the infringement of any one of them. They have elected to do this in the case on trial, and they only demand damages for the infringement of the last claim set out in the schedule.

This claim, as already stated, is for a slot cut through one bar of the buckle or clasp for uniting cotton ties, which enables the end of the tie or hoop to be slipped sidewise underneath the bar in the clasp or buckle, so as to effect the fastening with greater rapidity than by passing the end of the tie through endwise.

You are authorized to consider this case precisely as if Cook's patent covered only the last claim just set out; in other words, as if the patent secured the right to a slot cut through the clasp or buckle for uniting cotton ties, so as to enable the end of the tie to be slipped sidewise under the bar of the buckle instead of endwise, and nothing else.

The production of the patent is *prima facie* evidence that the several grants of right contained in it are valid, and that the several things, matters and devices covered by it were new; that they were useful; that they were the invention of Cook. *Potter v. Holland*, 1 Fisher, 387.

It was competent for defendant, by giving thirty days' notice thereof to plaintiffs, to show, if he could, either, first, that the invention had been patented or described in some printed publication prior to Cook's supposed invention; or, second, that Cook was not the original inventor or discoverer of any material or substantial part of the thing patented; or third, that it had been in public use or on sale in this country for more than two years before his application for a patent, or had been abandoned to the public. Sec. 61, Act of Congress approved July 8, 1870. (16 Stat., 208.) This notice was not given, and these matters are not at issue; nor is there any denial that the device described in Cook's third or last claim is useful. You may then take it as established that this invention was, when patented, new; that it is useful; that Cook was the first inventor; and that, by assignment, plaintiffs are invested with

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all the rights of Cook in the patent. In other words, there has been no attempt to overthrow the *prima facie* case made by the production of the patent and its assignment.

But the question is made, Was the device or invention described in Cook's third claim a patentable device or invention? The patent itself is *prima facie* evidence that it was. A patent cannot be granted for a principle or an idea, or for any abstraction whatever; for instance, for the naked idea of a slit, slot, or aperture, disconnected from any application. But when the idea is applied to a material thing, so as to produce a new and useful effect or result, it ceases to be abstract, and becomes a proper subject to be covered by a patent. For instance, the idea of bending the end of a cotton tie in a particular manner would not be the subject of a patent; but when the idea is applied to the fastening of the tie to a clasp or buckle, so as to produce a new and useful result, then it becomes patentable.

So the abstract idea of a slot in a buckle is not of itself patentable, but when the idea is applied to a buckle so that the result is new and useful, or so that an end is accomplished in a novel and useful manner, then the idea ceases to be abstract, and becomes the proper subject of a patent.

I, therefore, instruct you that the open slot cut through one bar of a buckle in a cotton tie, for the purpose set forth in Cook's third claim, is patentable, and, considered as separate and distinct from the other inventions covered by his patent, is a valid and patentable subject matter.

The court having thus disposed of the foregoing questions, it will be your duty to decide whether the defendant has, as alleged by the plaintiffs, infringed their rights under the Cook patent. In order that you may reach an intelligent conclusion on the subject, it is proper for the court to construe for you the third claim of Cook's patent, which is the only one alleged to have been infringed by the defendant.

What is secured by this claim is the right to use an open slot in a buckle, which without the slot would be a closed buckle, so as to allow the end of the tie or hoop to be slipped sidewise underneath the bar through which the slot is cut, and thereby

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to effect the fastening with greater ease, and obviate the necessity of the difficult process of pushing the end of the tie endwise under the bar.

The specification and model are both in evidence, and you will have no difficulty in comprehending the idea of the inventor.

The patent covers all the modes and processes by which the principle of the invention is made operative in practice. *Tilgham v. Werk*, 2 Fisher, 229.

The man who has made the first invention has it for all the uses to which it is applicable. *Woodman v. Stimpson*, 8 Fisher, 98.

A man cannot even have two patents for the same process, because for different purposes. When the means, devices and organization are patented, the patentee is entitled to the exclusive use of this mechanical organization, device or means for all the uses and purposes to which it can be applied — to every function, power and capacity of his patented machine or device — without regard to the purposes to which he supposed originally it was most applicable. *Conover v. Roach*, 4 Fisher, 12.

The plaintiffs claim the open slot in a buckle to facilitate the passage of the end of a cotton-tie under the bar of the buckle sidewise and not endwise. Now, he is entitled to the benefit of that device when that purpose is accomplished by the means provided, and substantially in the manner provided.

If a party uses the open slot described in the third claim of this patent for passing the end of a cotton-tie sidewise under the slotted bar, it makes no difference whether such end is in the form of a loop or not, if the result attained is that the end of the tie has been "slipped sidewise through the slot underneath the bar, so as to effect the fastening with greater rapidity than by passing the end of the tie through endwise." Then the result is the result claimed by the patent, and it is accomplished substantially by the means set forth in the patent.

I say to you, therefore, that the third claim of the Cook patent covers the open slot in a cotton-tie buckle used for the purpose of passing the end of the tie sidewise through the slot under the bar, no matter by what other manipulation of the

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tie that result is attained; and I say to you, further, that it is not necessarily connected with the remainder of the Cook tie, and it covers the open slot used on other forms of buckle for substantially the same purpose, and in substantially the same way.

With these instructions in mind, you will decide the issue whether or not defendant has infringed upon the third claim of plaintiff's patent. The defendant contends that the tie sold by him, and which has been exhibited to you, is not an infringement upon the patent of the plaintiffs; that the principle of the two is not identical, but different. Whether this is the fact, you must determine from the weight of the evidence, under the instructions of the court.

If the device on the buckle sold by defendant for the purpose of passing the end of the tie under the slotted bar is substantially the same as the device claimed by the plaintiffs' patent, then defendant has infringed upon plaintiffs' invention. The contrivances for the purpose in view must be substantially identical, and that is substantial identity which comprehends the application of the principle of the invention. If a party adopts a different mode of carrying the same principle into effect, and the principle admits of different forms, there is an identity of principle, though not of mode (*Page v. Ferry*, 1 Fisher, 298); and it makes no matter what additions to or modifications of a patentee's invention a defendant may have made; if he has taken what belongs to the patentee he has infringed, although with his improvement the original machine or device may be much more useful. *Howe v. Morton*, 1 Fisher, 586.

All modes, however changed in form, but which act on the same principle and effect the same end, are within the patent; otherwise a patent might be avoided by any one who possessed ordinary mechanical skill.

If you shall reach the conclusion that defendant has not infringed the patent of plaintiffs, that will conclude your duties on this branch of the case; but if you find he has infringed, it will then be your duty to pass upon the question of damages. The amount of damages is a question solely for your consider-

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ation; but it is the duty of the court to instruct you as to the rule of law by which the damages are to be estimated.

This rule is not what defendant made by the infringement, or what he might have made, but it is the loss sustained by plaintiffs by reason of the infringement. The amount of this loss you must gather from the evidence. It is proper to inquire how many customers were diverted from plaintiffs by the wrongful conduct of defendant, and what loss plaintiffs have sustained in profits by reason of such diversions. If plaintiffs were ready to supply the market with their patented goods, and their business was hindered or interfered with by the competition of defendant, plaintiffs' damages will be the amount of profit which they have lost by reason of such interference.

It now remains to consider the other branch of the case; to wit., the defendant's claim in reconvention.

This claim of defendant has already been stated in giving the substance of his answer, and you are to consider and determine from the proofs whether plaintiffs have infringed upon the patent of defendant. To assist you in this inquiry, it is the duty of the court to construe the letters patent under which defendant claims.

The third claim in defendant's reissued patent covers a link made with an open slot, of such a construction that the tie can be introduced in the manner shown in Figs. 6, 7, 13, and 14, which permits the link to be turned after the hoop has been inserted. This patent of defendant does not cover the open slot, as claimed by plaintiffs.

It is in proof, and there seems to be no controversy upon the point, that the plaintiff, J. J. McComb, has sold what is known to be the arrow tie, and it is the sale of this tie which the defendant claims to be an infringement upon his patent.

I instruct you, if the arrow tie is so constructed that it cannot be turned after the tie is passed through the slot in substantially the same way as described in Brodie's patent, it will not infringe that patent. But if it can be so turned, and is sold to be used in that way, or is so used by plaintiffs, then it is an infringement.

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The principles of law laid down in reference to the plaintiffs' branch of the case apply to and will govern the branch now under consideration. If, however, you should be of the opinion that plaintiffs have infringed on defendant's patent, you will not be authorized to return any damages for him if he has failed to show that he has so complied with law as to entitle him to recover damages.

The act of congress approved July 8, 1870, sec. 38 (16 Statutes at Large, 203), requires that every patented article sold shall be stamped with the word "patented," and the day and the year the patent was granted; and in any suits for infringement by the party failing so to mark, no damages shall be recovered by plaintiff except on proof that the defendant was duly notified of such infringement, and continued, after such notice, to make, use, and vend the article patented. So that if defendant has neglected to prove that his patented article was stamped, or that he gave the notice required by the statute, you cannot award him more than nominal damages.

My recollection is that no such proof was offered, and if this be so, you can return nominal damages only for defendant.

This comprises all that I deem necessary to say, except to add, that your duty is to approach the consideration of the case with minds unbiased and uninfluenced, save by the testimony, the arguments of counsel, and the charge of the court.

It is your duty to dismiss from your minds all preconceived opinions of the merits of this controversy, if any such you have, and decide the case as it has been submitted to you. Your function is, to pass upon the issues of fact, applying the law, as given you in charge by the court. Such is the rule for the administration of justice, and such is the obligation of your oath.

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Norton, Assignee, vs. De la Villebeuve.

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NORTON, Assignee, vs. DE LA VILLEBEUVE

1. The fact that an assignee in bankruptcy did not discover his right to certain property of the bankrupt, until after the expiration of two years from the time an action accrued to him therefor, does not remove the bar prescribed by the second section of the bankrupt act.
2. The bar prescribed by that section applies to causes of action which had accrued to the bankrupt before his bankruptcy as well as to those which accrued to the assignee after the bankruptcy.

Action at law for the recovery of certain real estate in the city of New Orleans.

*Messrs. E. C. Billings, Wm. Grant and Allan C. Story, for plaintiff.*

*Messrs. C. Roselius and Alfred Phillips, for defendant.*

WOODS, Circuit Judge. This is a petitory action brought to establish title to and recover possession of certain lots of ground in the city of New Orleans of which defendant is in possession claiming title. The parties have filed their written stipulation waiving a jury, and submit the cause to the court on the issues of fact and law.

The defendant pleads, among other defenses, the statute of limitations of two years, found in the second section of the bankrupt act. The clause of the section on which defendant relies is in these words: "But no suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person claiming an adverse interest touching the property or rights of property aforesaid in any court whatsoever, unless the same shall have been brought within two years from the time the cause of action accrued for or against such assignee; provided, that nothing herein contained shall restore a right of action barred at the time such assignee is appointed."

The plaintiff and defendant both claim title from the same source, to wit: from Person, the bankrupt; the plaintiff by virtue of his office as assignee and the transfer to him of all the

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property of the bankrupt, and the defendant by virtue of a sale made by order of this court before the bankruptcy of Person, on a mortgage executed by him upon the property in dispute.

The bar of the statute of limitations relied on by defendant, seems to be perfect and effectual, unless there is some circumstance pleaded and proven to take the case out of the operation of the statute, for on the 9th of March, 1868, Person, under whom both parties claim, was adjudicated a bankrupt, and the plaintiff was appointed his assignee on the 22d day of April 1868, and this action was not brought until the 21st day of August, 1871, a period of three years and four months, lacking one day, after the appointment of the assignee.

The plaintiff claims, however, to be relieved from the bar of the statute by the averment which he has sustained by proof that he did not discover said property and his right thereto until about the first day of July, 1871, one month and twenty-one days only before the commencement of this action.

The question is therefore presented, Does the fact that the plaintiff was ignorant of his rights relieve him from the bar of the statute? No case has been cited sustaining the plaintiff's view, nor do I think any can be found. If it had been the purpose of the law making power, that the limitation should begin to run from the time the plaintiff discovered his right of action, and not from the time his right of action accrued, it would have said so in unmistakable terms. To introduce such an exception into the statute, would be an act of legislation on the part of the courts, and would, it seems to me, be directly contrary to the policy of the bankrupt act, which looks to the speedy settlement of the bankrupt's affairs. It might be equitable in some cases that this view of the plaintiff should prevail, but it is not competent for the courts to engraft other exceptions on the statute, even on the ground that they are within the equity of these expressed. *Bank of Alabama v. Dalton*, 9 Howard, 522.

On this point the case of *McIver et al. v. Ragan*, 2 Wheaton, 25, is pertinent. The plaintiffs brought ejectment for 5,000

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acres of land in possession of defendant, and gave in evidence a grant from the state of North Carolina, comprehending the lands for which the suit was instituted. The defendant claimed under a junior patent and a possession of seven years held by Ragan, which, under the statutes of North Carolina and Tennessee constituted a bar to the action.

To repel this defense, the plaintiffs proved that no corner or course of the grant, under which they claimed, was marked except the beginning corner; that the beginning and nearly the whole land and all the corners except one were within the Indian territory. These lands were not ceded to the United States until 1806, within seven years from which time the suit was brought. The land in possession of Ragan, however, did not lie within the Indian territory. Upon these facts the plaintiffs requested the circuit court to charge the jury that the act of limitations would not run against the plaintiffs for any part of the tract, although outside the Indian boundary until the Indian title was extinguished to that part of the tract which included the beginning corner, and the lines running from it, so as to enable them to survey their land and prove the defendants to be within their grant. This instruction the court refused, and the cause was taken to the supreme court on writ of error, when MARSHALL, C. J., delivered the opinion of the court. He said: "The case is admitted to be within the act of limitations of the state of Tennessee, and not within the letter of the exceptions. But it is contended that as the plaintiffs were disabled by statute from surveying their land and consequently from prosecuting their suit with effect, they must be excused from bringing it, and are within the equity though not within the letter of the exceptions.

"The statute of limitations is intended, not for the punishment of those who neglect to assert their rights by suit, but for the protection of those who have remained in possession under color of title believed to be good. The possession of defendants being of lands not within the Indian territory and being in itself legal, no reason exists as connected with that possession why it should not avail them and perfect their title as

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intended by the act. The claim of the plaintiffs to be exempted from the operation of the act is founded, not on the character of the defendants' possession, but on the impediments to the assertion of their own title.

"Whenever the situation of a party was such, as in the opinion of the legislature, to furnish a motive for excepting him from the operation of the law, the legislature has made the exception. It would be going far for the court to add to those exceptions." The judgment of the court below was affirmed.

A discharge under an insolvent law does not take from the debtor the protection which is afforded by the statute, even by virtue of the equity of the exception of being "beyond seas," or "out of the state," although the reason why such absence of a defendant excuses the plaintiff from prosecuting is, that he cannot be reached by process of the courts. *Angel on Limitations*, 487.

It was contended in the supreme court of New York that the cause came within the equity of the statute; that the defendant had been discharged under an insolvent act, and that the discharge would prevent the statute from running against an action of assumpsit upon a contract made before the passage of the insolvent act, and the money not falling due until after the debtor's discharge. But the court held otherwise, and said: "Though the defendant's virtual protection from prosecution by the discharge produces the same result as his absence from the state, yet we are not warranted by any rule of construction in deciding that any cause which produces the same effect as the one mentioned in the act comes within it. It is not for the court to extend the law to all cases coming within the reason of it so long as they are not within the letter. It has been holden that no exception can be claimed unless expressly mentioned." *Bucklin v. Ford*, 5 Barb., 393.

So A. B. made his promissory note on the 17th of April, 1812, in favor of C. D., who indorsed it to E. F. An act of assembly was passed in Pennsylvania on March 13, 1812, which was in fact a bankrupt law. On the 31st of March, 1817, the supreme

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court of Pennsylvania held that said act was constitutional, and a discharge under it a bar to a recovery. The case on which the decision was made was removed to the supreme court of the United States, and there reversed on February 13, 1821. More than six years after the cause of action arose on the note, E. F., the indorser, brought a suit on it against A. B., the maker, and on a case stated, the following question was submitted for the opinion of the court: "Did the act of limitation run against the plaintiff while the act of March 13, 1812, was held by the supreme court of Pennsylvania to be constitutional?" It was held by the court that these circumstances did not stop the running of the statute. *Hudson v. Casey*, 11 Sergt. & Rawle, 10; *Angel on Limitations*, 487.

It would be unreasonable to require a case more directly in point to the question under discussion. The principle decided in the cases cited disposes of the claim of plaintiff.

He has been under no disability to sue; the courts have at all times been open to him, and the defendant at all times liable to be sued by him. The limitation provided by the statute had run against the plaintiff before he brought his action. He falls within the terms of the act, and the law makes no exceptions. The court cannot legislate for his benefit and make an exception in his favor, when the law has made none.

I am of opinion therefore that the plea of the limitation in the second section of the bankrupt act is a good and sufficient answer to the plaintiff's cause of action. Upon that issue the finding and judgment of the court is for defendant.

Upon the rendition of the foregoing decision the plaintiff entered a motion for a new trial, on the ground that the court erred in the effect given to the limitation of actions in the last clause of the second section of the bankrupt act. The theory now urged is that the limitation only applies to new causes of action, arising in favor of the assignee after the bankruptcy, and not to those which had existed before the bankruptcy and had come to the assignee by the assignment; as, for instance, damages for trespass to the property in the hands of the as-

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signee, or a conversion of the property assigned, to him, and such like cases. To support this view attention is called to certain provisions found in the 14th and 16th sections of the bankrupt act. The 14th section declares that the assignee "may sue for and recover the said estate, debts and effects, and may prosecute and defend all suits at law or in equity pending at the time of the adjudication in bankruptcy in which such bankrupt is a party in his own name, in the same manner and with like effect as they might have been prosecuted by such bankrupt."

The 16th section provides that "the assignee shall have the like remedy to recover all said estate debts and effects in his own name, as the debtor might have had if the decree in bankruptcy had not been rendered and no assignment had been made."

The argument is, that by applying to the assignee the brief limitation of two years, we do not give him the same remedy which the debtor might have had if the decree in bankruptcy had not been rendered and no assignment had been made, and that we do not allow him to sue for and recover the estate, debts and effects of the bankrupt in the same manner and with like effect as they might have been if sued for by the bankrupt.

I think this construction claimed for the limitation of the second section of the bankrupt act is too narrow. The general policy of the bankrupt act is to hasten the final settlement of the bankrupt's affair. The proceedings in bankruptcy are speedy, and in many cases summary. In the bankrupt act of 1841 it was provided (5 Stat., 447, sec. 10), that "all the proceedings in bankruptcy in each case shall if practicable be finally adjusted, settled and brought to a close by the court within two years after the decree declaring the bankruptcy." While this provision is not reenacted by the bankrupt act of 1867, it is clear that the policy of the law is the same as if it were. By the twenty-eighth section of the act, provision is made for a final dividend at the end of six months from the adjudication unless an action at law or suit in equity be then

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pending, or unless some other estate and effects of the debtor afterward come to the hands of the assignee, in which case the assignee shall as soon as may be convert such estate or effects into money, and within two months thereafter the same shall be divided in like manner. We think the limitation in the second section was enacted to carry out this policy of a speedy settlement of the bankruptcy.

In order to arrive at the true interpretation of the law upon the question in hand, the provisions of the second, fourteenth and sixteenth sections of the act must be construed together, as if they were all contained in the one section and stood side by side. So considering them, their meaning appears plain, and the effect of the three sections is this: The assignee may sue for and recover the estate, debts and effects of the bankrupt in his own name, and have like remedy to recover all said estate, debts and effects as the bankrupt might have if the decree in bankruptcy had not been rendered and no assignment had been made, provided his suit for that purpose is brought within two years from the time the cause of action accrued to him. This construction gives reasonable effect to all three sections and upholds the policy of the act looking to the rapid settlement of the bankruptcy. The clause in the bankrupt act of 1841 (5 Stat., 446, sec. 8), corresponding to the provision in the second section of the law of 1867, under consideration, is in these words: "And no suit at law or in equity shall in any case be maintainable by or against such assignee or by or against any person claiming an adverse interest touching the property or rights of property aforesaid, unless the same shall be brought within two years after the declaration and decree in bankruptcy, or after the cause of suit shall have first accrued." This phraseology excludes completely from the act of 1841 the construction which plaintiff attempts to put upon the act of 1867, for by the act of 1841, it is clear that if the cause of action accrued before the bankruptcy, the action must be brought within two years from the decree, and if after the bankruptcy, within two years from the time the action accrued. We think it clear that the effect of the provis-

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ion under consideration is the same, and that the change in the words used in the act of 1867 was not intended to accomplish an entire and radical change in the effect of the limitation.

The consequences which must follow the construction claimed by the plaintiff are so absurd as to demonstrate its incorrectness. Thus: no cause of action accrues upon a promissory note until its maturity; from that date only the statute of limitations begins to run. Now, according to the theory of plaintiff, if a promissory note, the property of the debtor, falls due the day after the bankruptcy, the assignee must bring his action within two years, but if it falls due the day before the bankruptcy, he is allowed the full term of the general limitation laws, six, ten or fifteen years, as the case may be, in which to bring his action.

Such, we are convinced, is not the true interpretation of the law. In our view, on all matured claims and demands, the cause of action accrues to the assignee at the date of the assignment; all others from their maturity or at the time when an action will lie, and he must sue within two years from these dates respectively. We are therefore unable to see any error in our finding and judgment, and the motion for a new trial must be overruled.

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**MYERS VS. THE LIZZIE HOPKINS.**

When a seaman, while in the discharge of his duty, is injured by reason of the neglect or carelessness of an officer of the boat, the boat is liable for his wages until restored, and for his subsistence and medical attendance in the meantime.

This was an admiralty appeal.

*Mr. R. H. Shannon*, for libellant.

*Mr. B. Egan*, for claimant.

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**Myers vs. The Lizzie Hopkins.**

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WOODS, Circuit Judge. The libellant claims of the libellee the sum of \$350.

He alleges that while employed upon the steamer Lizzie Hopkins, as a deck hand at the wages of \$50 per month, and while engaged in the discharge of his duty under the orders of the officers of the boat, he was seriously injured by reason of the carelessness of said officers and other employees of the steamer. That by reason of his injuries he was disabled from labor and confined in the hospital for three months and fifteen days. He asks a decree for his wages for that time at \$50 per month, amounting to \$175, and for \$175 for his subsistence, lodging and medical attendance for the same period, also amounting to \$175.

The defense is, substantially, that the injury received by libellant was caused, not by the wrongful conduct, carelessness or negligence of the officers of the boat, but wholly through the neglect and carelessness of libellant, and that the libellant was shipped for the round trip from New Orleans to Natchez and return, and no longer, and that the defendant is not liable for his wages or the expenses of his cure after the expiration of the time for which he was engaged.

The record shows that, while the Lizzie Hopkins was lying at Natchez Island taking on board a lot of cotton, and while the libellant and a comrade were engaged in rolling a bale of cotton on board, having just reached the shore end of the staging, another bale of cotton was allowed to escape from the grasp of two other hands who were upon the bluff, and it came down and struck libellant, knocking him down and breaking his arm, and that at the time the mate of the steamer was on the bluff giving orders and hurrying up the lading of the cotton.

The pretense that libellant was injured by reason of his own carelessness and negligence is utterly unsupported by any testimony in the case. No prudence or vigilance on his part could have averted the injury. He was in no way to blame. On the other hand, it appears that at the time of the occurrence it was raining, the bluff was muddy and slippery, and

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**Cavaroc vs. The Collector.**

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several bales of cotton had escaped from the grip of the hands and rolled down the bluff. Notwithstanding the lives and limbs of employees of the steamer were thus endangered, no additional care seems to have been taken by the mate to prevent a recurrence of this dangerous accident. The result was the serious injury of the libellant as above stated. I think it clear, from the record, that a decent regard for the lives and limbs of the hands in the employ of the boat, exercised by the officers of the boat, would have prevented the injury to the libellant.

The only question in the case then is, How far is the defendant liable for the wages and expenses of the libellant?

Without passing upon the question whether the steamer would be liable for the wages and expenses of the injured party after the end of the trip or voyage for which he shipped, when there was no fault on the part of the officers of the boat, I think that, in a case where an injury is received by a seaman while in the discharge of his duty, through the fault or neglect of the officers of the boat, the boat is liable for wages until the seaman is restored, and for the expenses of his keeping and medical attendance until restored. *Brown v. Overton*, 1 Sprague, 462; *Croucher v. Oakman*, 3 Allen, 185.

I am satisfied that libellant has demanded no more than the defendant ought to pay. Let a decree be entered in his favor for \$350 with interest from the date of the decree of the district court.

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**CAVAROC VS. THE COLLECTOR.**

Under section 16 of the act (16 Stat., 262), C. imported a lot of wine in bottles, each bottle containing more than a pint and less than quart; *held*, that the rate of duty was controlled by the actual cost of the wine and not by its cost estimated on the supposition that each bottle contained an entire quart.

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Cavaroc vs. The Collector.

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This was an action brought to recover of defendant, James F. Casey, who was collector of customs at the port of New Orleans, the sum of \$532, duties alleged to have been illegally imposed and collected by him from plaintiff. A jury was waived and the cause submitted upon an agreed statement of facts, which sufficiently appears in the opinion of the court.

*Messrs. Charles Case and J. D. Rouse*, for plaintiff.

*Mr. J. R. Beckwith*, U. S. Attorney, for defendant.

WOODS, Circuit Judge. The law controlling the case is found in 16 Stat., 262, sec. 21, and is as follows: "There shall be levied, collected and paid, the following rates of duties, that is to say, on all wines imported in casks, containing not more than twenty-two per centum of alcohol and valued at not exceeding forty cents per gallon, twenty-five cents per gallon; valued at over forty cents and not exceeding one dollar, sixty cents. \* \* \* On wines of all kinds imported in bottles, and not otherwise herein provided for, the same rate per gallon as wines imported in casks; but all bottles containing one quart or less than one quart shall be held to contain one quart, and all bottles containing one pint or less than one pint shall be held to contain one pint and shall pay in addition three cents per bottle."

The plaintiffs imported 507 cases of white wine in bottles, each bottle containing more than a pint and less than a quart. The wines were entered at the custom house at the quantity of three gallons per case. The cost of the wine was one dollar, fourteen cents and eight mills per case, commissions included. If the cost per case be divided by three, the number of gallons per case as entered, then the cost per gallon is less than forty cents and the duty imposed by law thereon is twenty-five cents per gallon and three cents per bottle.

But the collector ascertained by measurement the quantity contained in each bottle to be one-fifth of a gallon or two gallons and two-fifths of a gallon per case, and if the cost per case be divided by the latter number, the actual quantity, then the cost per case exceeds forty cents per gallon, and the duty

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Cavaroc vs. The Collector.

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is sixty cents per gallon and three cents per bottle. The defendant decided that this was the lawful method of estimating the cost and imposed duties at the latter rate upon the wine, estimating the *quantity* to be one quart per bottle or three gallons per case. The plaintiffs claim that by this method of deciding upon the rate of duty the collector has imposed duties to the amount of \$532.85 over and above what the law authorized.

The question presented for decision is, therefore, Was the collector right in the method adopted for estimating the value of the wine; in other words, was he or not bound, in estimating the value of the wine, to hold that each bottle contained a quart?

We think the method adopted by the collector was the correct one. The law is express that wines valued at not exceeding forty cents per gallon shall pay twenty-five cents, and valued at over forty cents and not over one dollar per gallon, sixty cents per gallon. There is no dispute that this wine actually cost over forty cents per gallon. It is, therefore, liable to pay a duty of sixty cents, unless the collector is bound, in estimating the value, to consider each bottle as holding an entire quart. To adopt the rule claimed as correct by plaintiffs, would be to allow the importer and not the law to fix the rate of duty. For by changing the size of his bottles he could reduce the duty from sixty to twenty-five cents per gallon without any change in the quality or cost of the wine. The provision, that each bottle containing more than a pint and less than a quart, shall be held to contain a quart, is intended only to fix the quantity on which the duty is to be imposed; the value of the wine is intended to be its actual and not a fictitious or arbitrary value.

The policy of the law is to impose the same uniform duty on the same article, and not to leave the duty to be regulated by the importer. It was not the purpose of the law to impose sixty cents on wine put up in bottles holding a quart, and twenty-five cents on the same wine put up in bottles of a smaller size.

Any hardship resulting from the application of this rule may be avoided by the importer by the simple process of im-

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**Daly vs. The Sheriff.**

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porting his wines in pint and quart bottles. He cannot be allowed to escape a part of the duties by changing the size of his bottles.

Let a judgment be entered for defendant.

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**DALY VS. THE SHERIFF.**

The property of A., consisting of a lease and stock of goods, was seized by the sheriff to satisfy an execution issued out of a state court against the property of B., and on the demand of the sheriff, an indemnity bond for the benefit of A. was furnished by the execution creditor; *held*,

1. That an action on such bond, or an action of trespass against the sheriff, is not such an adequate and complete remedy at law as would oust the jurisdiction of a court of equity of a bill filed to restrain the sale of the property of A. by the sheriff.

2. But a federal court cannot interfere by injunction to restrain a sale of the property of A. on an execution issued out of a state court against the property of B.

This was a cause in equity which was heard upon the motion of complainant for an injunction.

*Mr. J. J. Foley*, for complainant.

*Mr. E. Filleul*, for defendant.

WOODS, Circuit Judge. The bill of complaint states in substance that complainant is the owner of a lease of certain premises in the city of New Orleans, and of a stock of goods therein contained, where he is doing a profitable business as a merchant tailor. That the defendant, Sauvinet, claiming to act as civil sheriff of the parish of Orleans, has seized the lease and stock of goods as the property of one Dezulter, by virtue of a writ of *feri facias* issued on a judgment rendered against Dezulter at the suit of one Gardineir by the fifth district court of said parish; has placed a keeper in possession of the premises and goods, and is about to advertise and sell the property to satisfy the execution.

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**Daly vs. The Sheriff.**

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The bill prays for injunction and general relief. The case is now heard upon the motion for a preliminary injunction of which reasonable notice has been served on the defendant.

The reply of Sauvinet, defendant, to the motion for injunction, is, that having seized the property mentioned in the bill as the property of the defendant Dezulter, the complainant claimed it, whereupon he, Sauvinet, demanded of the plaintiff in execution, a bond of indemnity, which was furnished, and he therefore delivered the same to the complainant, according to the provisions of section 3579 et seq., Ray's Rev. Statutes. This proceeding he imagines is a bar to the present suit, by virtue of the provisions of article 3580, Ray's Rev. Statutes.

He further alleges that the complainant has a complete and adequate remedy at law, and that the state court having acquired jurisdiction over said property by the seizure thereof, in execution issued out of the state court, this court cannot and should not interfere to divest that jurisdiction.

The bill of complaint is, as usual in such cases, sworn to, and the facts therein alleged are not denied by the defendant, either by averment or proof.

It is evident that the complainant has no adequate relief at law. An action of trespass against the sheriff, or a suit on an indemnity bond would afford very inadequate redress for a wrong by which complainant's property was seized and sold, and his business broken up. While an action of replevin might restore the possession of the goods to complainant, it would not prevent a sale of the lease. The bond of indemnity taken by the sheriff may, under the law of this state, protect him from any action brought by the complainant against him for such seizure, but this law cannot control the equity jurisdiction of the United States courts, or preclude them from preventing irreparable mischief by the writ of injunction.

The only sound objection to the granting of an injunction is that the state court has acquired jurisdiction over the property seized, which this court should not interfere with.

In *Mock v. Kennedy*, 11 Annual, 525, decided in June, 1853, the supreme court of Louisiana, speaking by Mr. Justice

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LEA, upheld the right of a state court to restrain by injunction a United States marshal, who, on a writ of *fiery facias*, directed against the property of A., had seized the property of B.

The point is thus forcibly argued by Judge LEA :

“ The question presented is one of title, which is wholly independent of the proceedings in the federal court. Every court, whether state or federal, has as a general rule an exclusive control over the enforcement of its own process except so far as it is subject to the revision of an appellate tribunal. This court cannot inquire into the validity of the judgment upon which the execution issued, or the validity of the execution itself. But the plaintiff, without inviting any inquiry into the validity of these proceedings to which she is not a party, invokes the protection of the court against an illegal seizure of her property made by the officer charged with the enforcement of a writ of execution against a third person. She tenders an issue of title that has no connection with the proceedings had in the federal tribunal. This question we think the state tribunal may lawfully examine and determine, as it involves no conflict of jurisdiction.”

So in *Cropper v. Coburn*, 2 Curtis' Rep., 465, Mr. Justice CURTIS took the same view and held that the circuit court of the United States could enjoin a sheriff who on an execution against a judgment debtor had seized the property of a third person.

These decisions are sustained by the views of Chancellor KENT, as expressed in his Commentaries, vol. 1, p. 410, as follows: “ If the officer of the United States who seizes or the court which awards the process to seize has jurisdiction of the subject matter, then the inquiry into the validity of the seizure belongs exclusively to the federal courts. But if there be no jurisdiction in the instance in which it is asserted or if a marshal of the United States under an execution in favor of the United States against A. should seize the person or property of B., then the state courts have jurisdiction to protect the person and property so illegally invaded; and it is to be observed that the jurisdiction of the state court in Rhode Island was

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admitted by the supreme court of the United States in *Slocum v. Maybury* upon that very ground."

Unfortunately for complainant, however, all this has been expressly overruled by the supreme court of the United States in *Freeman v. Howe et al.*, 24 How., 453.

In that case Mr. Justice NELSON speaking for the court says: "Another and main ground relied on by the defendants in error is that the process in the present instance was directed against the property of the railroad company, and conferred no authority upon the marshal to take property of the plaintiff in the replevin suit. But this involves a question of right and title to the property under the federal process, and which it belongs to the federal and not the state courts to decide."

Again he says: "The case of *Slocum v. Maybury*, 2 Wheat., 2, has been referred to as holding a different doctrine from that maintained by the plaintiff in error in the present case. We have examined that case attentively and are satisfied that this is a misapprehension."

He adds further on: "Reference was made also in the argument in the present case to an opinion expressed by Chancellor Kent in his Commentaries, vol. 1, p. 410." He then quotes the passage already herein cited and adds:

"The error into which the learned chancellor fell, from not being practically familiar with the jurisdiction of the federal courts, arose from not apprehending for the moment the effect of transferring from the jurisdiction of the federal court to that of the state, the decision of the question in the example given, for it is quite clear upon the principle stated, the jurisdiction of the former and the validity and effect of its process would not be what the federal but state court might determine. No doubt if the federal court had no jurisdiction of the case, the process would be invalid, and the seizure of the property illegal, for which the party aggrieved is entitled to his remedy. But the question is, which tribunal, the federal or state, possesses the power to determine the question of jurisdiction or validity of the process. The effect of the principle stated by the chancellor, if admitted, would be most deep and extensive

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in its operation upon the jurisdiction of the federal court, as a moment's consideration will show. It would draw after it into the state courts not only all questions of the liability of property seized on mesne or final process issued under authority of the federal courts, including the admiralty, for this court can be no exception, for the purpose for which it was seized, but also arrests upon mesne and imprisonment on final process, of the person both in civil and criminal cases; for in every case the question of jurisdiction could be made; and until the power was assumed by the state court, and the question of jurisdiction of the federal court was heard and determined by it, it could not be known whether in the given case it existed or not. We need scarcely remark that no government could maintain the execution or administration of the laws, civil or criminal, if the jurisdiction of its judicial tribunals were subject to the determination of another."

This decision is affirmed and approved in the late case of *Buck v. Colbath*, 8 Wall., 334.

It seems clear that the converse of the proposition thus enforced by the supreme court is true, namely, that the federal courts cannot interfere with the powers of the state courts save in cases where the jurisdiction of the subject matter is exclusively vested in the federal courts, as in proceedings in bankruptcy, and cases arising upon letters patent and copyright.

The motion for the injunction must be overruled.

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**PALMER VS. BURNSIDE.**

1. Where real and personal property are purchased under proceedings on a junior incumbrance to which a senior incumbrancer is not made a party, an attempt made by the senior incumbrancer to bring the property to sale to satisfy his claim, is not an attack upon the title of the purchaser under the junior incumbrancer, nor any invasion of his rights.
2. Where a senior incumbrancer wrongfully carried away personal prop-

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erty subject to his own and a junior incumbrancer, his debt was not extinguished by "confusion" to the extent of the value of the property carried off.

3. *Confusion* and *merger* are synonymous terms.

4. A debt cannot be merged in a tort — nor can any part of it be extinguished by a credit or setoff claimed for unliquidated damages arising from a trespass.

IN EQUITY. This cause was heard upon the motion of complainant for a preliminary injunction.

*Mr. W. W. King*, for complainant.

*Messrs. John A. Campbell* and *Thos. Allen Clarke*, for defendant.

WOODS, Circuit Judge. The bill states in substance that in the year 1866, Mrs. Margaret Deas obtained a judgment against Mrs. Louisa D. Minor for \$4,500; that an execution issued on this judgment was levied on a certain plantation in the parish of Ascension, the property of the judgment debtor, and on the 22d day of May, 1868, the plantation was sold by the U. S. marshal by authority of the writ, to one James E. Zunts.

A monition was sued out by Zunts for the confirmation of his title. This proceeding was finally determined by the supreme court of the United States against Zunts, and the sale was annulled, and the heirs of Mrs. Minor, who in the meantime had departed this life, were restored to the possession of the property.

While Zunts was holding possession under the sale to him, he sold the plantation to Burnside, one of the defendants, who took possession of the plantation, and placed stock and farming implements upon it, and cultivated it. After the sale to Zunts was set aside, Burnside removed from the plantation the stock which he had taken there, and, it is alleged, also took away most of the stock which was upon the plantation at the time of Zunts' purchase, and many farming tools and implements.

Burnside acquired the judgment of Mrs. Deas on the 23d of June, 1871, and an order was made by this court to sell the property levied on to pay the judgment. The heirs of Mrs.

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Minor enjoined the sale under this order of the court. While this injunction was in force, Dunlap & McCance, junior mortgage creditors, seized and sold the plantation under process from the state court subject to the prior mortgage of Mrs. Deas. At this sale Palmer, the complainant, became the purchaser for \$28,500. The injunction restraining Burnside from proceeding to sell the plantation upon the order of sale was dissolved on the 13th of January, 1872, and Burnside is now threatening to proceed upon his order of sale to have the plantation sold by the U. S. marshal under said writ, to satisfy the judgment in favor of Mrs. Deas, to which he has been subrogated.

The complainant Palmer prays for an injunction to restrain Burnside from proceeding to sell the property under his writ.

The cause has been heard upon the motion for the injunction.

The complainant says that having purchased at a judicial sale, the sale cannot be treated as a nullity. But it seems clear that the bringing to sale of the property on an older and superior lien is not treating the sale to Palmer as a nullity. No right that he acquired under that sale is denied or interfered with. He has the same rights that the heirs of Mrs. Minor had in the property, and no more. That is what he purchased. They could not object to a sale on the mortgage lien of Mrs. Deas, nor can he. He purchased subject to all the rights conferred on Mrs. Deas, and her assignee by her judicial mortgage. One of them was the right to bring the property to sale to pay the debt. The exercise of this right is no attempt to disregard the rights of Palmer acquired under his purchase, nor is it an attempt to attack the sale to him collaterally. The validity of his purchase is recognized. No right of his under it is disputed. Burnside is only trying to exercise his own rights, which are superior to those of Palmer.

The authority cited by complainant (Hennen's Dig., 1031, sec. 1) to support this objection to the proceeding of Burnside, does not seem at all applicable to the question in hand. The proceeding to sell on Burnside's execution is not a revocatory action. Its purpose is not to test the validity of Palmer's title, but admitting his title to be all that he claims for it, to enforce

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a superior lien, and one which he admits to be superior and subject to which he purchased. As well might the purchaser at private sale from a mortgagor claim that a proceeding to foreclose his mortgage was an attack on his title.

It is next alleged that Burnside claimed a part of the proceeds of the property made at the instance of Dunlap & McCance, at which complainant became the purchaser, and he cannot therefore sue to annul the sale. There are two answers to this position :

1. The record submitted in evidence on this motion does not show that Burnside is claiming a part of the proceeds of the sale. His affidavit shows that he is only claiming the proceeds of a boiler and engine which he says was his own property, and which were seized and sold with the property of Mrs. Minor's heirs, and,

2. This proceeding of Burnside is not a proceeding to set aside the sale to Palmer as already shown.

It is further alleged, in support of the motion for injunction, that a large quantity of live stock and farming implements were upon the plantation of Mrs. Minor, upon which the claims of Burnside and Dunlap & McCance were liens; that Burnside, when he surrendered possession of the plantation to Mrs. Minor's heirs, carried away a large portion of this stock and farming implements, and that his debt has been extinguished to the amount of the value of this property, by what is termed in the civil law *confusion*, and therefore Burnside ought not to be allowed to proceed with the sale, until this property is accounted for, and the value thereof credited upon his claim.

The term "confusion" as used in the civil law is synonymous with "merger" as used in the common law. It arises where two titles to the same property unite in the same person. Article 2214 of the Civil Code provides that "when the qualities of debtor and creditor are united in the same person there arises a confusion of right which extinguishes the two credits." So at the common law, A. owes B. B. makes A. his heir, the debt of A. is merged.

But a tort does not create a debt. If the asportation of the

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personal property on the plantation by Burnside was tortious, it did not create a debt against him, which could be merged. He got no title to the property. He was a mere tortfeasor, and became no more the debtor of the owners of the chattels than if he had committed an assault and battery upon them. So no part of his debt was extinguished by his wrongful act, nor did he acquire any title to the property taken. It is still subject to the lien of his mortgage, and of the mortgage of Dunlap & McCance under which complainant purchased. The entire debt, secured by his judicial mortgage is yet unpaid. No part of it is merged, no part of it is extinguished or can be extinguished by a credit or setoff arising from unliquidated damages for a trespass.

It is next asserted by the complainants, (1), that succession property cannot be taken in execution; and (2), that the execution under which the marshal originally seized and sold the property under Burnside's judicial mortgage has been executed and returned; that the writ is *functus officio*, and no new proceedings can be had upon it.

These points were made to the court as objections to Burnside's motion for his *vendi* or order of sale, and were overruled by the court. As this was done after full argument, we have no disposition to interfere with the ruling of the court. We think that ruling was correct.

The case appears to us a very plain one. The complainant purchased the property at sheriff's sale with notice of and subject to the judicial mortgage of Burnside. He was entitled, under section 683, Code of Practice, to retain in his hands, out of the price for which the property was adjudicated to him, the amount required to satisfy the privileged debts and special hypothecations to which the property sold was subject. He now holds as part of the purchase price, the money to pay the privileged debt of Burnside. He can stop the sale by paying Burnside his money. This, it appears to me, would be a more just and equitable method of staying the sale than by invoking the writ of injunction. He ought not to be allowed to keep the property and keep the price, especially when the price is

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**Harp vs. The Grand Era.**

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demanded by parties having older and better rights than his, and which, by the terms of his purchase, he has agreed to pay.

I do not understand that the complainant by his purchase of the plantation at sheriff's sale became entitled to anything more than what was advertised and offered by the sheriff. His purchase gives him no title to the judicial mortgage of Dunlap & McCance, or any claim to the unsatisfied residue of that mortgage. He has what he bought and all he bought. He has no ground to complain of the pursuit by Burnside of his rights, and no good claim to ask the intervention of this court to stay the proceedings of Burnside.

The motion for injunction must be overruled.

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**HARP VS. THE GRAND ERA.**

Where several carriers unite to complete a line of transportation and receive goods for one freight, and give a through bill of lading, each carrier is the agent of all the others to accomplish the carriage and delivery of the goods, and is liable for any damage to them, on whatever part of the line the damage is received.

**APPEAL IN AMIRALTY.**

*Messrs. George W. Race, W. H. Foster and E. T. Merrick, for libellant.*

*Mr. R. H. Marr, for respondent.*

WOODS, Circuit Judge. On March 14, 1870, A. H. Redford shipped, at Nashville, eight boxes of books, on the steamer Tyrone, to be transported to New Orleans and delivered to libellant. A bill of lading was delivered by the officers of the Tyrone, by which the Tyrone reserved the right of reshipping.

The Tyrone proceeded to Cairo and transferred freight and bill of lading to the Grand Era, which received the goods and adopted the bill of lading.

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**Harp vs. The Grand Era.**

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On March 25, 1870, the Grand Era arrived at New Orleans and delivered said eight boxes to libellant. The books in five of the boxes were damaged by water, to the amount of \$422.91.

The answer of George L. Kouns, claimant, alleges that the boxes were not transferred from the Tyrone to the Grand Era, but from the Tyrone to the wharf boat at Cairo, and thence to the Grand Era. That the Grand Era had no agreement or understanding with the Tyrone, but the contract of the Grand Era was made with the shipper at Cairo, and was simply to transport the boxes from Cairo to New Orleans and there deliver them to the consignee. That the Grand Era did not assume or adopt the terms of the bill of lading given by the Tyrone, and did not become privy to or bound by any contract made by that boat.

That the books were well and carefully stowed on board the Grand Era and received no damage while so on board, and were delivered in the same condition in which they were received at Cairo.

Wm. P. Turpin and John Tansy testify that the books in the boxes were in good condition and dry when delivered to the Tyrone.

John M. Cloud, clerk of the Grand Era, witness for claimant, testifies that the books were in apparent good order when received from the Cairo Transfer Company, and they were delivered in the same order. They were stowed on the boiler deck beside the baggage of passengers, and he saw them every day and saw no damage done them.

The original bill of lading went through, and the Grand Era paid the Tyrone her share of the freight.

James Kerr, for claimant, testifies that the eight boxes were received at Cairo from one C. T. Hinde, agent of the Nashville Packets. They were received about March 18, and delivered in New Orleans, March 24 or 25. He says: "We gave to Hinde a transfer bill of lading, comprising all the freight shipped by said Hinde to a number of parties. The books were stowed

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**Harp vs. The Grand Era.**

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on a barricade, which is a rack between decks, and witness did not see how they could have been damaged by water."

The libellant testifies that the bill of lading given by the Tyrone was brought to his store in Camp street on March 25, 1870, and payment of freight demanded by a clerk of the owners of the Grand Era.

The evidence satisfies my mind beyond doubt, that the books were in good condition when delivered to the clerk of the Tyrone, and received on board that boat at Nashville, and that they were in a damaged condition when delivered by the Grand Era to Harp, the consignee, at New Orleans. The evidence does not disclose whether the damage was received while the books were on the Tyrone, or after they had been delivered to the Grand Era. So that the question is presented, Is the Grand Era liable for damage occurring while the freight was on the Tyrone, or at the wharf boat at Cairo?

As the Grand Era received the goods in apparent good condition, even if she is not liable for damage which was sustained by the goods before such delivery, the burden of proof is on the respondent, to show that the damage did not happen after they were delivered to her.

The burden of proof is on the carrier, to show that a loss was occasioned by a cause for which he is not responsible. *Nelson v. Woodruff*, 1 Black, 156; *English v. Ocean Steam Navigation Co.*, 2 Blatch., 425.

As already intimated, the evidence on this point is balanced and unsatisfactory.

But even if the damage occurred on the Tyrone or wharf boat, we think the defendant is primarily liable.

When several carriers unite to complete a line of transportation and receive goods for one freight, they are each liable for damages, subject to reclamation against the party by whose act the damage occurred. *Hart v. Railroad Co.*, 4 Selden's N. Y., 37.

Any other rule would subject shippers and consignees to such great inconvenience and uncertainty as to amount to a denial of a remedy. It sometimes occurs that in the courses of

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**Noyes vs. Willard.**

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transportation, freight passes into the custody of four or five different steamers or railroads, all forming one line and giving through bills of lading. To require the owner to ascertain to which one the damage is attributable before he brings his action, is putting a burden upon him, which makes relief almost impossible. Each carrier is the agent of all the others to accomplish and complete the carriage and delivery of the goods, when a through bill of lading is given and freight charged.

Under this rule of law we entertain no doubt that the defendant is liable in this action for the damage sustained by the consignee. The damage is satisfactorily shown to be \$422.19, for which, with interests and costs, let a decree be entered against the steamboat and the obligors on the bond of release.

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**NOYES VS. WILLARD.**

1. Defendant in equity has no right as a matter of course to file more than one plea. But when great inconvenience might otherwise result in a particular case, the court will sometimes in its discretion allow several pleas.
2. Where a defendant in equity has filed several pleas without leave of the court, he will be put to his election as to which he will stand upon.
3. In general when a defendant insists by plea upon matter which is apparent on the face of the bill and might be taken advantage of by demurrer, the plea will not hold.
4. Where want of jurisdiction appears upon the face of the bill, the objection should be taken by demurrer.
5. Where an assignee in bankruptcy recovered a fraudulent judgment against an alleged debtor of the bankrupt, and the judgment debtor filed a bill in the circuit court to enjoin execution upon the judgment; *held*, that the fact that all parties were citizens of the same state did not oust the court of jurisdiction.
6. The fact that a state statute has provided a remedy at law against a fraudulent judgment does not preclude the judgment debtor from a resort to the equity courts of the United States for relief against it.

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Noyes vs. Willard.

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7. A sale of a fraudulent judgment at a public vendue of a bankrupt's effects does not confer upon an innocent purchaser the right to enforce payment of the judgment, notwithstanding its fraudulent character.

IN EQUITY. This cause was heard upon the sufficiency of defendant's pleas to the bill of complaint.

*Mr. Henry B. Kelly*, for complainant.

*Messrs. A. Micou and B. R. Forman*, for defendants.

WOODS, Circuit Judge. The bill is filed by Noyes, who alleges himself to be a citizen of Louisiana, against Norton as assignee in bankruptcy of Victor Hebert and against James A. Willard, both of whom are also averred to be citizens of Louisiana. The case made by the bill is in substance this: Among the assets of the bankrupt Hebert which passed to Norton, his assignee in bankruptcy, was a promissory note made by complainant for the payment to the order of Hebert of \$1,842, and dated May 22, 1865. Before his bankruptcy, to wit: on the 17th of February, 1866, Hebert, the payee, being then the holder and owner of the note, in consideration of the conveyance by complainant to a trustee of all his property for the benefit of said Hebert and other of his creditors, gave to complainant a full discharge and acquittance of his liability on the note. Notwithstanding this discharge and acquittance, on April 14, 1869, a suit was brought in the name of Norton as assignee, against complainant, in the United States district court for the district of Louisiana, on the note. Upon service of summons in the action complainant called upon Stone, the attorney of Norton, and advised him of the fact of said release and discharge and stated to him that his liability on the note had been extinguished.

He was thereupon assured by Stone that the release was satisfactory and that no further proceedings would be taken against complainant in the suit on the note, and that complainant need give himself no further trouble about it. The complainant, trusting in these assurances of Stone, took no steps to

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defend the suit at law. Nevertheless the suit was fraudulently and clandestinely prosecuted, and on the 4th day of May, 1869, judgment was rendered against complainant in the district court, for the full amount of the note, with interest and costs.

The bill alleges that the defense of complainant to the suit at law on the note was a good and sufficient one, and complainant would have made his defense had he not been fraudulently misled by the assurances of Stone, whereby he was prevented from making any defense to the action, either in person or by attorney.

The bill further alleges that the defendant Willard claims to have purchased the judgment and to be subrogated to the rights of Norton; had caused a writ of *feri facias* to issue on the judgment, by virtue of which, on the 8th day of July, 1871, the United States marshal seized certain property of complainant, and was about to advertise the same for sale to satisfy the judgment.

The bill prays for an injunction against Norton and Willard, to restrain them from further proceedings on the writ of *feri facias*, and for general relief. If the averments of this bill are true, it is a clear case for the interposition of a court of equity.

Accordingly, after notice to the defendants, an injunction was allowed against them as prayed for in the bill.

The defendant Willard has filed three distinct pleas to the bill of complaint, to the effect:

1. That this court has no jurisdiction of the case, because the complainant and both defendants are citizens of the state of Louisiana.

2. That complainant's remedy, if he has any, is by bill of review or a petition of nullity or other proper proceeding in the district court, or by appeal from said judgment to this court.

3. That the duties of Norton, the assignee of Hebert, have been concluded, and said bankrupt is discharged, and the judgment mentioned in the bill of complaint has been sold by order of the bankrupt commissioner, and the proceeds, with other assets, distributed.

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Norton also files three pleas identical with the pleas of Willard, except that he adds to the third plea, that since the sale of said judgment he has no interest therein, and has not claimed any and does not claim any, either individually or as assignee.

He also appends an answer denying any fraud or deception practiced upon complainant, and any fraudulent combination with his codefendant Willard.

These pleas were set down for hearing and the case has been heard upon their sufficiency.

The objection to these pleas is obvious, that the defendants have the right, as a matter of course, to file only one plea and not more. The practice of courts of equity does not admit of several pleas except that, where great inconvenience might otherwise result in a particular case, the court will sometimes, in its discretion, allow several pleas. Though a defendant may file a single plea without application to the court, he cannot put in a double plea without such application, and when the court allows double pleas, it is on the condition that the defendants pay the costs. Story's Eq. Pleadings, sec. 657.

The defense proper for a plea is such as reduces the cause or some part of it to a single point, and from thence creates a bar to the suit or to the part of it to which the plea applies. 1 Dan. Ch. Pr., 680; Mitford's Ch. Pl., 219; 1 Smith Ch. Pr., 217; *Goodrich v. Pendleton*, 3 Johns. Ch., 384.

Each of the pleas filed in this case is intended to be an answer to the whole bill, and as they have been filed without leave, the defendants should be put to their election as to which one they will stand upon.

The first and second pleas are also open to the objection that the defenses therein relied on are proper subjects for demurrer and not plea. They do not set up any new fact nor deny any fact alleged in the bill.

In general a plea relies upon matters not apparent upon the face of the bill, and in most cases it is a rule that when a defendant insists upon matter by plea which is apparent upon the face of the bill, and might be taken advantage of by demurrer, the plea will not hold. Mitford's Ch. Pl., 219.

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A demurrer is the proper mode of defense to a bill when any objection is apparent upon the bill itself, either from the matter contained in it or from defects in its frame or in the case made by it. Story's Eq. Pl., sec. 446. The first and second pleas rely upon matter stated in the bill, as showing a want of jurisdiction in the court. This should therefore have been taken advantage of by demurrer.

But waiving objection to the manner in which the defenses of the first and second pleas are set up, we are of opinion that both pleas are bad in substance.

The fact that both complainant and defendants are citizens of Louisiana does not oust this court of jurisdiction of the case.

In the suit in which Norton as assignee recovered judgment against the complainant, both parties were citizens of the same state, yet the court had jurisdiction, because the bankrupt law expressly gave it without regard to the citizenship of the parties. The jurisdiction of this court in this case is maintained by virtue of the same law.

The last clause of the second section declares that "the circuit court shall have concurrent jurisdiction with the district courts of the district of all suits at law or in equity which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee touching any property or rights of property of said bankrupt transferable to or vested in such assignee."

So this court has jurisdiction over this class of cases as it has in admiralty or in controversies arising under the patent or copyright laws without regard to the citizenship of the parties.

The second plea is equally unfortunate. It declares that the remedy of complainant, if he have any, is by bill of review, or a petition of nullity or other proper proceeding in the district court, or by an appeal to this court. A bill of review, or an appeal in an action at law, where a judgment has been recovered upon a promissory note, would be something unheard of in the courts of the United States. As to the proceeding of nullity of judgment, if it is applicable at all to the courts of the United States, it by no means appears from the bill of com-

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plaint or pleas that it would avail the complainant, for no vices of form in the judgment are shown, and if the ground of nullity is that the judgment was obtained by fraud, the remedy must be sought in the equity courts of the United States, and not by a proceeding in the nature of an equity proceeding on the law side of the court. But even if this proceeding were open to complainant it would not preclude him from applying to a court of equity to enjoin the execution. Even the allowance of a writ of error would be no obstacle to the granting of an injunction. *Parker v. The Judges*, 12 Wheaton, 564.

In a word, the complainant has not mistaken his remedy. He has adopted the proper course and the only course open to him to relieve himself from the consequences of a gross fraud, if the facts he alleges in his bill be true.

The third plea of the defendants presents no valid defense to the relief sought by the bill. The fact that Norton has administered fully upon the bankrupt's estate, and the bankrupt has been discharged, and the judgment sought to be enjoined has been sold by order of the bankrupt court, and the proceeds distributed with the other assets of the bankrupt's estate, constitutes no reason why this fraudulent judgment should be enforced, and the property of complainant sold to satisfy it. The judgment was not a negotiable instrument, which the purchaser without notice could collect notwithstanding its fraudulent character. Norton is a proper party to the bill, and Willard, the transferee of the judgment, cannot shield himself under the statement that the bankrupt's estate has been fully administered.

Neither the plea nor answer of Norton deny that Stone, Norton's attorney and agent, perpetrated the fraud charged in the bill. Willard does not deny the fraud, and the plea set up no facts which constitute the slightest defense to the bill of complaint.

The pleas for the reasons stated are therefore overruled.

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Griswold vs. Connolly.

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## GRISWOLD VS. CONNOLLY.

1. When a writ of *venditioni exponas*, issued from the circuit court, ran in the name of the president of the United States, bore *teste* of the chief justice of the United States, was under the seal of the court, but was not signed by the clerk, but by the deputy clerk in his own name, neither the writ nor the proceedings under it are void.
2. The defect in the writ could only be taken advantage of in a direct, and not in a collateral proceeding.
3. The fact that a good defense existed against a decree of condemnation, but which was not pleaded before decree, will not avoid the decree.

ACTION AT LAW. The parties waived a jury and submitted the cause to the court, both on the facts and law.

*Messrs. Allen C. Story and Wm. Grant*, for plaintiff.

*Messrs. L. Madison Day, H. J. Leovy and E. T. Merrick*, for defendants.

WOODS, Circuit Judge. The plaintiff brings his action to establish his title to, and to recover possession of certain real estate in the city of New Orleans.

It is shown that the plaintiff was in possession of the premises, claiming title prior to and up to May 6, 1862. It is conceded that he ought to recover, unless the evidence adduced by defendant shows that his title has been divested. To establish this, the defendant introduces a record of this court in the case of *The United States v. The Confederate Rifle Factory*, by which it appears that the property in question was condemned by the court on the 20th of May, 1864, as forfeited to the United States, and ordered to be sold by the marshal, which was done, and the property adjudicated to Ellen Christy. The deed of the marshal to her is in evidence, and deeds from Ellen Christy to John Hughes & Co., and from John Hughes & Co. to defendant Connolly.

If the proceedings in the United States court, in the case just mentioned, were operative to divest plaintiff's title, it is admitted that defendant's title is good, and the finding and judgment of the court should be for him.

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The only objections to the record in that case which were not passed upon in the case of *Bragg v. Lorio*, *post*, 209, decided in this court during the present term, are: That the *venditioni exponas*, which constituted the marshal's authority for the sale, was signed by F. B. Vinot, deputy clerk, in his own name as such deputy, and not by the clerk. No other defect is alleged to exist in the writ. It ran in the name of The President of the United States; it bore *teste* of the Chief Justice of the United States, and was under the seal of the court.

It emanated from the court and was returned to the court, and the proceeds of the sale made under it were distributed by the court. In my opinion, the signing of the *vendi* by the deputy clerk in his own name, and the want of the signature of the clerk himself was an irregularity only, and did not avoid the writ and proceedings under it. It was such an irregularity as could be taken advantage of only in a direct and not in a collateral proceeding.

This objection to the record must therefore be overruled.

It is next objected to the record that the plaintiff Griswold, the owner of the property condemned under the name of The Confederate Rifle Factory, took the oath of amnesty on the 15th of March, 1864, which was before the decree of condemnation, and as it is conceded he was not within any of the exceptions in the proclamation of amnesty of the president, dated the 8th of December, 1863, therefore his property was relieved from confiscation. Unquestionably this would have been a good defense, if pleaded, to the decree of condemnation. *Armstrong's Foundry*, 6 Wall., 766; *St. Louis Street Foundry*, 6 id., 769. But the record shows that this defense was not made. The court had jurisdiction of the subject matter, the oath of amnesty was taken by Griswold after the commencement of the proceeding, and the fact that a good defense existed which was not brought to the notice of the court, did not oust the court of jurisdiction or avoid its proceedings.

This objection must also be overruled.

As the only objections urged against the proceedings in the circuit court for the confiscation of the property in question

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are ineffectual to render the proceedings void, we must hold that plaintiff's title has been divested; that title is now in defendant as shown by the proof.

The finding and judgment of the court must be for defendant.

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1. It is competent for a party to sue for an infringement of any one of the separate and distinct inventions that may be covered by his patent.
2. The fact that other devices, superior to that covered by complainant's patent taken as a whole, have been invented, and have driven the latter out of use, does not prove or tend to prove that such invention lacks utility, as the law uses that term.
3. The presumption, created by the issue of letters patent, that the patentee was the first and original inventor, is greatly strengthened by the extension of the patent, especially when the extension is resisted on the ground of want of novelty.
4. While the decision of the commissioner of patents is not entitled upon this question to the force of *res adjudicata*, yet it is a determination entitled to the respect of the courts, and should not be reversed except upon the most satisfactory proof.
5. The open slot in the metallic cotton-bale tie, patented to Frederic Cook, March 2, 1858, held not to have been anticipated by an elongated open ring, such as is used for fastening parts of chains together. No use to which the latter could naturally be applied would suggest the open slot in a rectangular flat buckle for the introduction of a flat band sidewise.
6. Said invention held not to have been anticipated by the English patent to George Hall, No. 2,561, A. D. 1801.
7. The buckle described in the English provisional specification of Palliner, A. D. 1856, held not to be described in such terms that the public could construct and put it to the use designed by Cook, without further invention.
8. The fact that defendant has taken out patents for other improvements relating to the same subject is no reason why he should not be enjoined from infringing upon the improvement covered by complainants' patent.
9. The writ of injunction issues on the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious

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interruption of that right which, on just and equitable grounds, ought to be prevented.

10. Where complainants produced their patent; proved an uninterrupted use of the invention, without infringement, for eleven years; had established their patent by an action at law, in which every defense known to the law might have been set up, and had obtained an extension of the patent in the face of vigilant and interested opposition, a preliminary injunction was granted.
11. Property in a patent is just as much under the protection of the law as property in land.
12. When the owner has made good his claim to his patent and shown an infringement of it, it is the duty of the courts to give him the same relief meted out to suitors in other cases.

This was a suit in equity, brought by Frederic Cook and James J. McComb against Frederic B. Ernest, Frederic Ernest, John S. Wallis, Wm. Chambers, Geo. Norton, Mortimer O. H. Norton, Arthur L. Stewart, Andrew Stewart, William Stuart, Hugh Stuart, A. D. Gwynne, and George Brodie, for the alleged infringement of letters patent granted to said Cook on the 2d day of March, 1858, for a new and useful improvement in metallic ties for cotton-bales.

It was heard on a motion for a preliminary injunction.

*Messrs. Samuel S. Fisher, John A. Campbell and W. M. Randolph,* for complainants.

*Messrs. John Finney, Thomas A. Clark and Thomas L. Bayne,* for defendants.

WOODS, Circuit Judge. The bill states, in substance, that complainant, Cook, prior to the second day of March, 1858, was the original and first inventor of a certain new and useful improvement in metallic ties for cotton bales, and which had not been known or used before his invention, nor been in public use before his application for a patent therefor.

That on the day and year aforesaid, letters patent were issued to him for the said invention by the proper department of the government of the United States, granting to him and his assigns, etc., the exclusive right of making, issuing and vending to others his said invention.

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That on the 22d day of January, 1872, before the expiration of the original term of said letters patent, the said Cook contracted and agreed, in writing, to convey to his cocomplainant, McComb, for a valuable consideration, all his right and title in said letters patent for the extended term thereof, if the same should be extended by the commissioner of patents, which agreement was duly recorded in the patent office.

That on January 31, 1872, said Cook filed in the patent office a disclaimer to so much of said invention set forth in the letters patent as were embraced in the first claim of invention therein, which disclaimer was recorded according to law.

That on the 17th day of February, 1872, the commissioner of patents renewed and extended said letters patent for the term of seven years from and after the expiration of the original term of fourteen years, to wit: from March 2, 1872.

That during the original term of said patent, a suit was brought on the law side of this court, by Mary Frances McComb and James Jennings McComb, the then owners of said patent, against one George Brodie, for an infringement thereof, which was tried before a jury at the November term, 1871, of this court, to wit: in March, 1872; that much testimony was introduced on both sides of said cause; the defendant denied the patentability of said invention described in the third claim and the scope thereof, and denied infringement, and set up a claim in reconvention against the plaintiffs, for the infringement of a patent issued to him on March 22, 1859, for an improved metallic band for baling cotton, and claimed that the buckle which he had made and sold was covered by his own letters patent. That the jury found the issues joined for the plaintiffs, and rejected the claim in reconvention of the defendant.

That since the date of such extension the legal title to said letters patent has been vested in Cook, subject to the equitable rights of McComb, under the contract aforesaid; that the improvement specified in the third claim of invention in said patent is of great value; that said claim has been applied by complainants to use, and introduced into the market, to the great advantage of the public.

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That defendants, without consent of complainants, and in violation of their rights in said letters patent, have made, used and vended to others to be used, and are now making, using, and vending to others, and are preparing to continue to do so, metallic ties for baling cotton containing the invention set forth in said letters patent, and claimed in the third claim of invention, that is to say, the slot described in the specification of said letters patent, cut through one bar of clasp, which enables the end of the tie or hoop to be slipped sideways underneath the bar in clasp, so as to effect the fastening with greater rapidity than by passing the end of the tie through endways, and that defendants have a large quantity of said ties, so constructed, in their possession, which they are preparing to sell, without consent of complainants and in violation of their rights. That defendants have been requested to desist from making and vending said ties, and have been notified of complainant's exclusive rights as aforesaid, but disregarding complainant's rights, have combined with others to make, use and vend said ties.

The bill prays for an account of profits and damages, and for injunctions, both provisional and perpetual, against defendants.

The case is now submitted to the court on the motion of complainants for a provisional injunction, after reasonable notice to defendants, who appear by counsel and resist the motion.

To sustain their motion the complainants introduce the letters patent to Cook, the extension by the commissioner of patents, the contract of Cook with McComb assigning to him the right of Cook in the extension, a certified copy of the examiner's report on the application of the extension of the Cook patent, and of the reasons of opposition to the extension filed by William Chambers, and the testimony on said application, the affidavits of M. B. Munoy, Frederick Cook, F. B. Parkinson, James J. McComb and William Clough, and the record in the case of *Mary Frances McComb and James J. McComb v. George Brodie*, on the law side of this court. (See p. 158.)

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From this evidence it appears that McComb had the equitable title and Cook the legal title to the extension of the letters patent originally issued to Cook.

The schedule accompanying Cook's original patent discloses that the patent was intended to cover three separate and distinct inventions.

1. A friction buckle or clasp, represented by figures 1, 2 and 3, showing the different views of it, for attaching the ends of iron ties or hoops for fastening cotton bales and other packages.

2. The manner of looping the ends of the iron ties or hoops into a buckle, by the form of which they are prevented from slipping by friction when the strain of the expansion of the bale comes on the ties.

3. The slot cut through one bar of the clasp or buckle, as shown in the diagram, which enables the end of the tie or hoop to be slipped sideways underneath the bar in the clasp or buckle, so as to effect the fastening with greater rapidity than by passing the end of the tie through endways.

As already said, the bill complains of the infringement of the third claim only. The device covered by this claim is so clearly stated as to need no explanation.

The affidavit of Cook shows that in 1857, he commenced the manufacture of ties according to his invention, which was patented to him in March, 1858, and that up to 1861, when he sold his patent to one A. C. Sturdevant, he had made and sold a number sufficient to bale 20,000 bales of cotton, and he exhibits with his affidavit one of the ties made according to his invention in 1857.

The affidavit of McComb shows that since 1856, he has been engaged in the enterprise of introducing metallic ties for baling cotton; that in 1859, his attention was called to a device said to be the invention of one Taylor, which was simply a square buckle with an open side, through which the loop end of the band could be passed edgeways, but on inquiry at the patent office he learned that the open buckle was the invention of Cook, who had taken out a patent for it March 2, 1858. That

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he afterward invented a modification of the form of the mortice in the buckle, now generally known as the "arrow tie," and in 1861, through an intermediate assignment, his wife, Mary Frances McComb, became the owner of the device patented by Cook, and by uniting his own with Cook's invention, produced what is now known as the "arrow tie."

That in 1861, he went to England and made arrangements for shipping large quantities of bands and ties as soon as the blockade then existing was raised, which did not occur until 1865, when he at once commenced shipping his ties to each of the southern ports, and has continued to do so until the present time, and is prepared to supply fully the demand for iron ties in this country.

That the first open infringements of the open slot tie were in 1869, and they have so increased that in 1870, one-third of the ties in competition with the arrow tie were open sided, and in 1871, the entire importation were open sided.

That he has frequently and constantly notified infringers that they would be prosecuted, and has only refrained from so doing by the fear of impairing his credit in England, where litigation in reference to patent rights is much dreaded. Nevertheless, he did bring the suit of Mary Frances and James McComb against George Brodie, which resulted as stated in the bill of complaint.

The affidavit of Muncy shows that the defendants are selling in the city of New Orleans ties with a buckle containing an open slot, one of which buckles is attached to the affidavit; and the affidavit of William Clough, an expert, is to the effect that the buckle sold by the defendants employs the device described by Cook, in the third claim of his letters patent.

The documents filed showing the extension of Cook's letters patent show that in applying for said extension, he disclaimed the first claim of invention in his original patent, and took out his extension for only his second and third claims.

The certified records from the patent office also show that the extension of Cook's patent was opposed, among other grounds, because other parties and not Cook were the first to

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invent devices that rendered the use of iron bands practicable for baling cotton, and because Cook was not the first to use the slotted link for fastening metallic bands around cotton bales.

The report of the examiner, in the application of Cook for an extension, states that among the many numerous American inventions of that class, none is found previous to that date (the date of Cook's patent), with an element of construction, answering to his open slot. Attention was, however, called by him to the English patent, No. 2561, A. D. 1801, granted to George Hall, for elastic fastenings for shoes, and also bands, garters and ornaments for the knees, etc., showing buckles provided with open slots in numerous modifications of form and construction.

On consideration of this report, the commissioner of patents, as shown in the proof, extended the patent of Cook for the term of seven years, as alleged in the bill.

This is the case as presented by the complainants, and it appears to me that it establishes the right of the complainants to their writ of injunction, unless the case is overthrown by the showing made by defendants.

To resist the motion for the injunction the defendants have offered a large number of affidavits. Many of these affidavits are to the effect that the affiants have for a long time been engaged in the sale of metallic cotton ties, and have never sold, or seen in use, a tie constructed according to the original patent of Cook.

The affidavit of John S. Wallis, among other things, states that long before Cook's invention, the use of open links, or buckles, for the fastening of belts, bands and chains, was common and public, and he illustrates his affidavit by attaching thereto, what is popularly known as an open link, commonly used in trace chains.

Samuel H. Boyd testifies to the same effect, and Francis B. Fassman testifies that, in April, 1871, he saw the open link, like the one described by Wallis, actually used to fasten the bands around a bale of cotton.

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Caleb S. Hunt also testifies that he is familiar with the use of the links or buckles, having slots for introducing rapidly an end loop into the mortice, and has known of such use for forty years.

The English patent to George Hall, referred to in the report of the examiner on the application of Cook for an extension, is also introduced to show want of novelty in Cook's invention.

Numerous affidavits are introduced exhibiting models and drawings of Frederick James Palliner's provisional specification No. 1584, of English patents of 1856, showing a device which is claimed to be substantially the device of Cook's third claim. This device of Palliner was intended for fastening military belts.

From this statement of the contents of the affidavits presented by defendants, it will be seen that Cook's invention is attacked on two grounds, want of utility and want of novelty.

It is obvious to notice that all the affidavits intended to show want of utility referred to the three claims of invention, covered by Cook's patent, taken together. The affiants say that they have never seen the tie as described in these three claims used. But, as already stated, Cook's patent covers three separate and distinct inventions. It is competent for the complainants to sue for an infringement of any one of them, and in this case they complain only of the infringement of the third claim under the patent.

These affidavits do not show and are not intended to show that this claim is not a useful contrivance. The testimony clearly shows that the open slot for passing the end of the iron tie through the bar of the buckle sideways is used on nearly all the ties now sold, which is conclusive proof of the utility of that part of Cook's claim. But taking the three devices of Cook's patent as one combined contrivance, there can be no doubt of its utility.

The testimony shows that ties made according to all three claims of his letters patent sufficient to bale 29,000 bales of cotton were made and sold by Cook.

All the law requires as to utility is, that the invention shall not be frivolous or dangerous. It does not require any degree

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of utility. It does not exact that the subject of the patent shall be better than anything invented before or that shall come after. If the invention is useful at all, that suffices. *Hoffheins v. Brundt*, 3 Fisher, 218.

To warrant a patent, the invention must be useful — that is, capable of some beneficial use, in contradistinction to what is pernicious, frivolous or worthless. “Useful,” in the patent law, is in contradistinction to mischievous; the invention should be of some benefit. *Cox v. Griggs*, 2 Fisher, 174.

The degree of utility is not pertinent to the question of the validity of a patent. *Tighlman v. Week*, 2 Fisher, 229.

The word useful in section 6 of the act of 1836, and in section 1 of the act of 1793, does not prescribe general utility as the test of the sufficiency of an invention to support a patent. It is used merely in contradistinction to what is frivolous or mischievous to the public; it is sufficient if the invention have any utility. *Wintermute v. Redington*, 1 Fisher, 239.

If the defendant has used the patented improvement, or something substantially like it, he is estopped from denying its utility. *Vance v. Campbell*, 1 Fisher, 433.

Tested by these rules, the defense of want of utility is clearly untenable. The entire invention, covered by Cook's patent, was intended for a useful purpose. It can be and has been used for that purpose. It is not frivolous nor mischievous. The fact that other devices, superior to Cook's original device, taken as a whole, have been invented, and have driven it out of use, does not prove or tend to prove, that his invention lacks utility, as the law uses that term.

The next defense presented by the affidavits is the want of novelty. This is confined to the third claim of invention, namely, the open slot for passing the end of the iron tie sideways under the bar of the buckle.

The issue of letters patent is *prima facie* evidence that the patentee was the first and original inventor. This *prima facie* case is greatly strengthened by the extension of the letters patent, especially when, as shown in this case, the extension is resisted on the ground of want of novelty.

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While the decision of the commissioner of patents is not entitled upon this question to the force of *res adjudicata*, yet it is a determination entitled to the respect of the courts, and should not be reversed except upon most satisfactory proof.

The original presumptions of novelty and utility, arising from the grant of a patent, are strengthened by its extension. *Whitney v. Mowry*, 3 Fisher, 157.

Upon an application for an extension of a patent, the law requires a very rigid scrutiny into the original claim of the patentee, as to the novelty and utility of the invention; and the extension strengthens the novelty and utility of the patent. *Swift v. Whisen*, 3 Fisher, 343. To overthrow the case made by complainant, as to the novelty of invention described in Cook's third claim, we have, first, the affidavits of Wallis, Hunt and Fassman, showing the long anterior use of open links, like those attached to their affidavits, for connecting chains and bands.

Upon the issue of novelty, testimony will not be received to show what might have been done with previous machines. *Howe v. Underwood*, 1 Fisher, 160.

It is not enough to defeat the novelty of an invention, that prior contrivances are produced, which might, with a little change, have been made into the patented contrivance, though not so intended by the maker. *Livingston v. Jones*, 1 Fisher, 521.

When a useful machine is sought to be invalidated by an old one made years ago, the testimony should be examined with care and caution, to ascertain whether the prior machine was actually and substantially the same. *Hayden v. Suffolk Manufacturing Co.*, 4 Fisher, 87.

Changes in the construction and operation of an old machine so as to adapt it to a new and valuable use, which the old machine had not, are patentable, and may consist either in a material modification of old devices, or in a new and useful combination of the several parts of the old machine. *Seymour v. Osborne*, 11 Wall., 516.

The link presented by the affidavits of Wallis and others is

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an elongated open ring. It is similar to a device long used for attaching the clevis of a plow to the doubletree, and it is exactly like the open links used by farmers for lengthening trace or other chains, by fastening two parts of chains together. The pretense that the prior use of this open link shows want of novelty in Cook's third claim is utterly untenable. It is a device designed to accomplish no such purpose as Cook's device, and is not adapted to that end. As used for uniting chains, a closed link is inserted in the slot of the open link. It was not designed to be used for the insertion of a hook or loop, for that could be done in a closed as well as open link, and with more facility in the former by putting the end of the hook or loop into the link than by passing it sideways through the opening.

It can, with more plausibility, be claimed that all closed buckles for fastening the ends of metallic cotton ties lack novelty, because iron links have been in use ever since the invention of chains. The fact that the link shown by Wallis' affidavit is in the form of a ring shows that it was not designed for the introduction of flat bands like cotton ties, and no use to which it could naturally be applied would suggest the open slot in a rectangular flat buckle for the introduction of a flat band sideways.

The next item of evidence to establish want of novelty is the English patent to George Hall for elastic fastenings for shoes, bands, garters, etc., No. 2561, A. D. 1801.

This patent was used before the commissioner of patents to show want of novelty in Cook's third claim, in order to defeat the extension of his patent, but the effort was not successful. An examination of a model of Hall's buckle shows that it was not intended as a fastening for metallic ties or bands, and that it is so constructed that a metallic band cannot be introduced sideways through the open slot into the buckle, the stationary tongues in the buckle preventing the passage of any metallic bar or band.

This, therefore, cannot be claimed as an invention embodying the same principle as Cook's.

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The provisional specification of Frederick James Palliner, No. 1584 of English patents of 1856, shows a buckle which, as represented in the drawings of the experts who have attempted to give form to the device described in the specification, approaches much nearer the invention of Cook than the open link described by Wallis, or the device patented by Hall. It is a contrivance for fastening military waist belts. It is not shown that any patent was issued for that device, and the proof does not show that it was described in any printed publication prior to Cook's invention, which, the evidence shows, was as early as 1857.

But I am by no means satisfied that the device of Palliner is identical with that of Cook. The provisional specification does not describe the device covered by Cook's third claim of invention. Remotely suggestive of it, it may be, but the illustrations given by the experts do not agree, nor is the buckle described in such terms that the public could construct and put it to the use designed by Cook without further invention. *McMillin v. Burclay*, 5 Fisher, 189.

We are, therefore, brought to the conclusion that defendants have not only overcome the case made by the complainants as to the validity of the Cook patent, but have failed to show its want either of utility or novelty.

The question of infringement of the third claim of the Cook patent, by a device the same in principle as that of the defendants, has been recently tried by a jury on the law side of this court, resulting in a verdict for the plaintiffs. An inspection of the tie of the defendants shows that it is substantially identical with the device of Cook, embodying the principle of his invention.

The defendants claim that to entitle complainants to an injunction they should have an undisturbed possession, and that an injunction will not be granted if it disturbs the existing condition of things. If by undisturbed possession it is meant that the patent has never been infringed, then an injunction could never be granted in any case, for when there is no infringement

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there is no necessity for, nor propriety in the allowance of an injunction.

The claim of Cook under his patent has never been attacked in the courts.

He and those claiming under him have had undisputed possession of their property in the patent. They have continually asserted their rights under it, and have warned and threatened infringers. Notwithstanding their warnings and threats, the infringers have, as their evidence shows, continued to invade the rights of the patentee and his assignees.

It is now claimed that an injunction should not issue, because it would disturb the order of things — that it would put a stop to infringements, and give a protection to the property of complainants, which the defendants will not voluntarily accord.

In other words, the claim is that because the defendants have been invading the rights of claimants for one, two or three years, they should not be enjoined, lest the existing order of things should be disturbed.

The very purpose of the bill of complaint is to disturb the existing order, and to induce a new order, by which the complainants may be protected in their property and rights. If the existing order of things is a good reason for refusing a preliminary injunction, it would be a still stronger reason for refusing a perpetual injunction on the final hearing, for the order of things would then have existed for a greater period of time.

The rule laid down by Mr. Justice Woodbury in *Perry v. Parker*, 1 Woodbury and Minot, 281, is, that if respondent denies the complainant's title, and casts a shadow over it by evidence, the grant of the injunction must be delayed till the validity of the title can be tried under a proper issue in the case, unless the complainant can strengthen his claim beyond the mere patent, by showing former recoveries in favor of it, or quiet possession of it for some time, or frequent sales and use of it under him. In this case complainants have strengthened

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their claim, by showing that their original patent has been extended, in spite of strong opposition ; that they have recovered upon their patent at law, when all defenses to its validity might have been made if defendants had so elected, and by showing quiet possession, and frequent sales, and use, and a general acquiescence in their rights from 1858 to 1869, when open infringements first appeared.

Several patents issued to the different defendants for various improvements in cotton ties have been introduced in evidence, and the rule is invoked that an injunction will not issue where the defendants hold under a patent.

Admitting this to be the correct rule, it has no application to this and similar cases, for none of the patents issued to the defendants cover the third claim of the Cook patent, for the infringement of which this suit is brought. The fact that these defendants have taken out patents for other improvements in cotton ties is no reason why they should not be enjoined from infringing upon the improvement covered by complainants' patent. As well might a defendant to a bill for the infringement of a sewing machine patent set up against a prayer for injunction, the fact that he held a patent for a reaping machine.

The writ of injunction issues on the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of that right which, on just and equitable grounds, ought to be prevented. Hilliard on Injunctions, 19.

In this case the complainants have clearly established their rights under their patent; first, by the production of the patent itself; second, by the use of the patented article for three years immediately after the date of the patent, followed by the uninterrupted use of the assignee, without infringement, for eight years more; then, by an action at law in which the patent was sustained, in which every defense known to the law might have been set up; and finally, on the expiration of the original term of fourteen years, by proof of the extension of the patent in the face of vigilant and interested opposition.

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The defendants have been warned to desist from their invasion of the plaintiffs' rights. They disregarded the warning, and continue to use complainants' property without their leave and without any compensation to them. If the rights of property so invaded were rights to land or other tangible estate, no court would hesitate a moment to restrain the wrong doer. The property in a patent is just as much under the protection of the law as property in land. The owner has the same right to invoke the protection of the courts, and when he has made good his claim to his patent, and shown an infringement of it, it is the duty of the courts to give him the same relief meted out to suitors in other cases.

The defendants have had ample notice of this motion. They have been fully heard upon it. I am convinced that the complainants have shown themselves entitled to the relief they ask, and that defendants have shown no good reason to the contrary.

Injunctions will issue against all of the defendants.

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BRAGG VS. LORIO.

1. In an action to recover possession of and establish title to real estate, when the defendant relies upon title derived through confiscation proceedings, no error or irregularity in such proceedings can be regarded which does not go to show want of jurisdiction in the court which rendered the judgment condemning the property. The judgment is binding until reversed in a direct proceeding.
2. A seizure of property under the confiscation acts, made by the marshal, upon the written order of the United States attorney, is sufficient to give the court jurisdiction of the *res*.
3. Under the act of March 3, 1821 (8 stat., 648), the deputy clerk of the U. S. district court for Louisiana was authorized to sign process in his own name as such deputy, and a *venditioni exponas* so signed and in other respects regular, and under the seal of the court, is valid.
4. The amnesty proclamation of the president, of July 4, 1868, did not have the effect to restore to the party out of whom before that time the title had been divested, property condemned, and the title to which was vested in the United States, by confiscation proceedings.

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This cause was submitted to the court upon the issues of law and of fact, the parties having waived the intervention of a jury.

*Mr. Allan C. Story*, for plaintiff.

*Mr. C. Roselius*, for defendants.

WOODS, Circuit Judge. The plaintiff brings his action to establish his title to and recover possession of a certain plantation situate in the parish of Lafourche, in the state of Louisiana, known as the "Greenwood" plantation, of which he avers he is seized as of an estate in fee simple, and whereof for many years prior to the 3d day of January, 1866, he was in possession. He alleges that on the day last named, the defendants wrongfully and forcibly ejected him from the plantation and took possession of the same, which they still hold.

The defendants by way of defense set up title in themselves, claiming under a sale made by the United States' marshal on the 3d of January, 1866, by virtue of a writ of *venditioni exponas* issued from the district court of the United States for the eastern district of Louisiana, in the suit of *The United States v. The "Greenwood Plantation," the property of Braxton Bragg*. This was a proceeding to confiscate said plantation as enemies' property commenced and concluded under the act of congress, approved July 17, 1862, entitled "an act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes." (12 Stat., 590.)

It is admitted that prior to the 3d of January, 1866, Bragg was seized and in possession of the lands sued for, and that he is entitled to recover unless his title has been divested by said proceedings and sale.

It is well settled that irregularities in the confiscation proceedings, mere errors of law, cannot be taken advantage of in this collateral proceeding. No error can be regarded here that does not go to the extent of showing want of jurisdiction in the court which rendered the judgment condemning the property. *Cooper v. Reynolds*, 10 Wall., 308; *Tyler v. Defrees*, 11 Wall., 344. But plaintiff avers that the proceedings were so defect-

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ive that the court acquired no jurisdiction over the property, and therefore the decree of condemnation and the marshal's sale and deed are absolutely void. The defendants claim that the court did acquire jurisdiction, and having jurisdiction, the proceedings are valid until reversed, and that the sale and deed of the marshal convey title. This presents one of the questions for our determination.

"When we are called upon to sit in review on the judicial proceedings of the inferior courts in the enforcement of the confiscation statutes, we are to be governed by the reasonable and sound rules applicable to analogous cases in the courts, and not by a system of procedure so captious, so narrow, so difficult to understand or to execute, as to amount to a nullification of the statute." *Tyler v. Defrees*, 11 Wall., 345.

The record in this case shows that on September 11, 1865, the property in question was seized by the U. S. marshal under written authority of the district attorney, as forfeited to the United States, and that the property was within the jurisdiction of the court. That on the 12th of September, 1865, a libel was filed reciting the seizure and praying the condemnation of the property, and that on the same day a writ of seizin was issued to the marshal, directing him to seize and take in possession the property aforesaid, which was returned October 2, 1865, with the indorsement that he had seized the property in the hands of Thomas W. Conway, Assistant Commissioner of the Freedman's Bureau, and served notice of seizure personally on said Conway, etc.

The record, in our opinion, amply shows a seizure, sufficient to give the court jurisdiction. In the case of *Tyler v. Defrees*, *supra*, the only seizure was the one made by the marshal on the order of the district attorney, preliminary to the filing of the libel. The record showed no other. Yet in that case it was held that the court acquired jurisdiction. The court say: "The proceeding inaugurated by the district attorney is designed to bring the property into court. It can have no other purpose or end, unless released by his order. The district attorney and marshal are both officers of the court,

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and for that reason are selected to institute the proceedings by which the power of the court is called into exercise. When, therefore, the property is, in the course of this proceeding, seized by the marshal, and when, with the filing of the libel, all that has been done is brought before the court, and it adopts and recognizes the seizure, the property is held by him subject to the order of the court, and is under its control, and no second seizure by the same officers can be necessary."

So in *Cooper v. Reynolds*, 10 Wallace, 809, the court speaking of the various modes of acquiring jurisdiction, said :

"While the general rule in regard to jurisdiction *in rem* requires the actual seizure and possession of the *res* by the officer of the court, such jurisdiction may be acquired by acts of equivalent import, and which stand for and represent the dominion of the court over the thing, and in effect subject it to the control of the court. Among this latter class is the levy of a writ of attachment or seizure of real estate, which being incapable of removal, and being within the territorial jurisdiction of the court, is for all practical purposes brought under the jurisdiction of the court by the officer's levy of the writ and return of that fact.

In this case we have not only a preliminary seizure, which the supreme court in *Tyler v. Defrees* held to be sufficient to give the court jurisdiction, but a subsequent seizure made after the filing of the libel, by order of court, and the return of the officer showing the seizure.

Beyond doubt, therefore, the court acquired jurisdiction.

The plaintiff has pointed out what he conceives to be numerous irregularities and errors of law in the subsequent proceedings, but the fact that the court had jurisdiction, being established, these do not render void the decree of the court. It is binding until reversed in a direct proceeding, and cannot be impeached collaterally.

Exception is taken to the writ of *venditioni*, under which the marshal made the sale to the defendants, and it is claimed that this writ is void, and conferred no authority upon the marshal,

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and that his proceedings and sale under it were void and conveyed no title.

An inspection of the writ shows that it is in the name of the president of the United States, that it bears test of the judge, and is under the seal of the court. It is however signed by W. S. Benedict, deputy clerk, and not by the clerk himself. This fact, it is claimed, avoids the writ.

By the act of March 3, 1821 (3 Stat., 643), the clerk of the district court of the United States for the district of Louisiana is authorized "to appoint a deputy to aid him in the discharge of the duties of his office, for whose acts the clerk shall in all respects be liable." We think it clear that the deputy appointed by virtue of this act may do any act which the clerk is authorized to do. Among other acts he may sign process in his own name. A narrower construction of the statute would render it vain and useless. Without the aid of this statute the clerk may and must perform a large part of his duties by other hands. Provided they are done under his authority and by his direction, they are valid. But there are certain acts which must be done by the clerk in his own name. To enable them to be done by the deputy was the purpose of the statute. The clerk is made responsible for these acts of his deputy on his official bond by the express words of the law.

But granting that the writ of *venditioni exponas* was void, and the sale under it void, the only result is that the record shows the title still to be in the United States, by the decree of confiscation.

In actions of ejectment the plaintiff recovers on the strength of his own title. The defendant may successfully defend by showing title out of the plaintiff. So if we hold that the defendants took no title by the confiscation proceedings that does not help the plaintiff's case, for if the court had jurisdiction his title was divested and vested in the United States by the decree of November 23, 1865, where the title still remains.

But the plaintiff further insists that under the proclamation of amnesty and pardon issued by the president on July 4, 1868, he was restored to his rights of property, and as the sale

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under the proceedings for confiscation did not take place until after the date of said proclamation, such sale was void and conveyed no title. We do not think the effect claimed for the proclamation by plaintiff can be attributed to it, but the obvious answer to this claim is that the property was condemned and the title divested out of plaintiff and vested in the United States by the decree of the court, on the 23d of November, 1865, long before the date of the proclamation, and the proclamation expressly excepts from its effects any "property of which any person may have been legally divested under the laws of the United States." Having already held that by the proceedings for confiscation the plaintiff was legally divested of his property until the decree of the court shall be reversed by a direct proceeding in error, we are of opinion that the plaintiff can take no benefit from the proclamation in this case.

The court therefore finds for the defendants upon the issues of fact, and orders that judgment be entered accordingly.

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ELLETT VS. BUTT and others.

1. The owner or lessee of land may give a valid mortgage upon his crop before it is raised.
2. An act of the legislature of Mississippi provided that it should be lawful to convey by way of mortgage or deed of trust any crop of cotton, etc., being produced or to be produced within fifteen months. *Held*, that a mortgage executed before the passage of this act on a crop to be produced in the future was valid, the enactment being merely declaratory of what the law was before its passage, adding a limitation that the crop must be produced within a given time.
3. The transfer to the purchaser of land of a note given to the former owner for rent, and the transfer of a mortgage on the crop to secure the note invests such purchaser with the lien created by the mortgage.

This was a cause in equity, and was submitted for final decree upon the pleadings and evidence.

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*Messrs. J. N. Lea, John Finney and H. C. Miller, for complainant.*

*Messrs. Thomas Allen Clarke, Henry L. Bayne and Henry Renshaw, Jr., for defendants.*

WOODS, Circuit Judge. The bill alleges in substance, that on September 4, 1866, William Sillers, of the state of Mississippi, was seized in fee of the "Asia" plantation, situated in Boliver county in that state, and that on the 1st day of January, 1867, by a writing of that date he leased said plantation to one John H. Graham for one year for a rent reserved of \$7,000, one-half to be paid on the first of October by a draft drawn by Graham in favor of Sillers on the defendants, who were commission merchants and factors in the city of New Orleans, and the other half on November 1st, to be evidenced by the note of Graham payable to Sillers and falling due on that day. Graham by the stipulations of the lease pledged and mortgaged the crops grown on the plantation during the year 1867, to the faithful performance of his covenants therein written, and authorized Sillers and his assigns on thirty days' notice to seize and sell the same for cash, the said sale to raise money sufficient to pay all arrearages of rent. That the lease was duly executed and recorded.

That Sillers and Graham met in the city of New Orleans on the 8th of February, 1867, for the purpose of procuring the acceptance of defendants of the draft to be given by Graham on them by the terms of said lease, and the said lease and mortgage was then and there exhibited to the defendants, and was read and considered by them and the terms thereof fully understood and a counterpart thereof left with them.

That with full notice that Sillers had the first lien on the crop of Graham, they accepted said draft, and the same has been paid and satisfied. That Graham also delivered to Sillers the note for \$3,500 provided for by said lease, due Nov. 1, 1867.

That said mortgage contained in said lease became by the laws of Mississippi, a lien upon Graham's crop superior to all

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claims of other creditors of Graham, and of any claim of defendants against him.

That Graham cultivated the plantation under said lease during the year 1867, and planted, matured and gathered a crop of cotton amounting to 49 bales of 450 pounds each.

That on the 4th day of September, 1866, the circuit court of Claiborne county, Mississippi, rendered a judgment against Sillers, in favor of the present complainant, for \$10,103.89, which, being duly recorded on September 14, 1866, became a lien upon the "Asia" plantation. That on the 28th of April, 1867, an execution issued on said judgment was levied on said plantation, and the same was sold by the sheriff at public auction, to complainant, on the 3d day of June, 1867, by virtue of said execution, and the plantation was conveyed to him by the sheriff by deed of that date.

That at the time of said sale, Graham was in possession of said plantation under said lease, and the effect of the sale was to substitute complainant in the place of Sillers as landlord of Graham, and to entitle complainant to the rent of the plantation which had not yet fallen due. That Sillers, knowing the legal effect of said sale and conveyance, indorsed and delivered the said note of Graham to complainant, who is now the holder and owner thereof, and entitled to pursue all remedies for its collection that Sillers might.

That, in the fall of 1867, the defendants, through an agent sent for that purpose to the plantation, received from Graham 49 bales, the crop of cotton produced by him on said plantation during that year, and shipped the same to New Orleans, and sold and disposed of the same to their own use, well knowing that the same was subject to the lien of complainant. The cotton was middling cotton, and worth at the time it was taken by defendants 25 cents per pound. That on the shipment of the first 27 bales complainant notified defendants by letter that he claimed the cotton, and should hold them responsible for its proceeds.

The bill prays for an account of the amount for which said cotton sold, to be estimated at the highest price reached by

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cotton since the asportation thereof by defendants, and before final decree, and that defendants may be required to pay the value thereof so estimated to be applied on the amount due complainant on the note of Graham.

The answer of defendants admits that they saw and read, in February, 1867, the lease made by Sillers to Graham, but avers that Sillers stated that the part thereof by which he secured a lien on Graham's crop for the payment of rent was not valid and binding by the laws of Mississippi, and that he released the same so far as it affected them. They deny that the lease to Graham operated as a lien upon the crop. They deny that the cotton shipped by Graham was shipped through the intervention of their agent. They deny that they had any notice of complainant's claim on the cotton until the receipt of his letter dated November 25, 1867.

They further say that, in February, 1867, they entered into a contract in writing with Graham, by which they agreed to advance to him \$5,500 in supplies for his plantation, besides accepting the said draft for \$3,500, and Graham agreed to ship to them the cotton grown on the Asia plantation to be sold, and that they should have a lien upon the same to repay the said advances. And that this agreement was recorded in Bolivar county, Mississippi, on February 20, 1867.

Complainant files the general replication.

The first question presented by these pleadings is, Did Sillers, by the document called a lease and mortgage, secure a lien upon the crop of Graham for the payment of the rent?

The legislature of Mississippi by an act approved February 18, 1867, subsequent to the date of Sillers' lease, provided that it should be lawful to convey by way of mortgage or deed of trust, any crop of cotton, etc., being produced or to be produced within fifteen months from the date of such mortgage. The defendant draws the inference from this act that such a mortgage was not valid before the date of the act. We think the act to be merely declaratory of what the law was before its passage, adding a limitation that the crop mortgaged must be produced within fifteen months. If property not *in esse* or in

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the ownership of the mortgagor can be mortgaged, and that question we will consider presently, there surely can be no reason why a crop to be produced during the current year might not be mortgaged. Such a contract is not immoral, against public policy, or fraudulent. If the parties are capable of contracting, such a contract, if made on valuable consideration, has all the elements of a binding contract.

Can property to be acquired *in futuro* be incumbered by mortgage? The authorities answer this question in the affirmative. In *Pennock v. Coe*, 23 Howard, 117, the point was made that a person cannot grant what he has not got. But the court said "that the principle has no application to the case before us. The mortgage here does not undertake to grant *in presenti* property of the company not belonging to them or not in existence at the date of it, but carefully distinguishes between present property and that to be afterwards acquired," and the court held that a grant can take effect upon the property when it is brought into existence and belongs to the grantor in fulfillment of an express agreement founded on a good and valid consideration, where no rule of law is infringed or the rights of a third party prejudiced.

So in *Mitchell v. Winslow et al.*, 2 Story, 631. Mr. Justice STORY says: It seems to me a clear result of all the authorities, that whenever the parties by their contract intended to create a positive lien or charge either upon real or personal property, whether then owned by the assignor or contractor or not, or if personal property, whether it is then *in esse* or not, it attaches as a lien in equity or charge upon particular property, as soon as the assignor or contractor acquires a title thereto against the latter, and all persons asserting a claim thereto, under him, either voluntary or with notice. See, also, 2 Story's Eq. Jurisprudence, sec. 1021; Cross on Liens, 187, 188, et seq.; *Preble v. Boghurst*, 1 Swanston, 309; *Needham v. Smith*, 4 Russell, 318; 1 Powell on Mortgages, 190; *Metcalf v. Archbishop of York*, 1 Mylne & Craig, 553; *Field v. Mayor of New York*, 2 Selden, 179. The doctrine is too well settled to be now questioned.

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We have therefore reached the position that the contract by which Graham mortgaged his crop for 1867 to Sillers was a valid and binding contract between the parties. It was also binding against those who had notice of it. The sole purpose of the contract was to give Sillers a lien superior to the claims of others, for without the contract, Graham's crop would have been liable to be seized in payment of his debt to Sillers. It is unnecessary to decide what effect as to notice the recording of the mortgage had, for the fact is admitted by defendants' answer that in February, 1867, they had actual notice, having read the contract and being furnished with a counterpart of it. The evidence is also clear to the point that defendants had this actual notice before they contracted with Graham and before his execution of a mortgage to them upon the same crop.

The next question is one of fact. Did Sillers in his conference with the defendants on the 6th of February, 1867, agree to release his lien upon Graham's crop secured by his lease and mortgage?

The defendants aver in their answer that he did.

This is new matter, not responsive to any allegation of the bill, and it is incumbent on defendants to establish it by proof. They have offered no evidence to support this averment. On the contrary it is flatly contradicted by Sillers, and Graham testifies that in his conference with defendants in February, 1867, it seemed to be the understanding of all parties that Sillers would have a lien on the crop for his rent. The conclusion from the testimony is therefore inevitable that Sillers did not agree with defendants to waive his lien upon the crop of Graham.

We have then reached this further ground, that Sillers having a contract with Graham, giving him a lien on Graham's crop, gave actual notice thereof to defendants, and did not waive his rights under his contract. His lien being older than the lien of defendants is superior in equity, and as between Sillers and defendants, Sillers had the right to have the crop of Graham applied first to the payment of the debt, secured by his lien.

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The next question is, have the rights of Sillers been transferred to Ellett, the complainant. Unquestionably Ellett, on his purchase at the sheriff's sale of the "Asia" plantation, became entitled to all the rent which fell due after the date of his deed, whether it had or had not accrued before the sale, even without the transfer of the note given by Graham for the rent. But Sillers indorsed and transferred the note of Graham, secured by the mortgage, and delivered the mortgage itself to the complainant. According to all the authorities this transfer vests in the transferee the rights of the mortgagor to the security.

The assignment of a note secured by a mortgage is in equity an assignment of the mortgage, unless there is some special provision of the parties to the contrary. *Johnson v. Hart*, 3 Johnson's Cases, 322. *Lawrence v. Knapp*, 1 Root, 248.

So that a mortgagee who has assigned absolutely the note secured by the mortgage, need not be made a party to a suit by the assignee for payment of the note out of the mortgaged premises. KENT, J., in *Johnson v. Hart*, 3 Johns. Cases, 322.

The complainant then stood in Sillers' shoes. He was entitled to have Graham's crop first applied to the payment of the note assigned to him by Sillers. His lien was the elder and better one. The defendants through their agent Ruhl, as the testimony abundantly shows, carried off the entire crop and appropriated its proceeds to their own use. Having done this with full knowledge of the prior lien, they must account to complainant for the value of the crop at the time of its asportation, with interest from that date. This is the rule of damages in trover and trespass *de bonis asportatis*, and should be applied here as the measure of the complainant's claim. The decree must be for complainant. If the parties cannot agree upon the amount, the case must be referred to a master to report upon that matter.

NOTE.—Affirmed by U. S. supreme court. See *Butt v. Ellett*, 19 Wall, 544.

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The Confiscation Cases.

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APRIL TERM, 1872.

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## THE CONFISCATION CASES.

1. Although proceedings for confiscation of lands are proceedings at law, and are to be reviewed by writ of error, yet proceedings by way of intervention in the course thereof, setting up a lien on the property, are often in the nature of a bill of equity, and may be reviewed by way of appeal.
2. Letters of credit given to a Confederate agent to enable him to prosecute his mission abroad in aid of the Confederate government are to be considered as given in aid of the rebellion, and void.
3. Loans made by a Frenchman in Paris to a Confederate agent, unless knowingly made for the express purpose of carrying on hostilities against the United States, are to be regarded as made by an innocent neutral, and valid.
4. But such agent could not transfer to such neutral property within the union lines, as security for the loan, after it became subject to confiscation, so as to defeat the right of the United States to seize and confiscate the same.
5. Such right of confiscation accrued in this case on the passage of the confiscation act, July 17, 1862. (12 Stats., 590.)
6. A covenant by a landlord to pay for improvements erected by a tenant does not constitute a lien upon the premises for the value of the improvements.
7. The proceedings under the fifth, sixth, seventh and eighth sections of the confiscation act of July 17, 1862, are *in rem*, conforming as near as may be to proceedings in admiralty when the seizure is on water, and to revenue cases when the seizure is made on land.
8. If a claimant of land or property, seized on land, contests the material facts alleged in the libel of information, the issue is to be tried by a jury.
9. When no answer is filed, judgment by default may be taken, and the court may proceed to ascertain the material facts in the case *ex parte* and without a jury.
10. If a third person intervenes for the purpose of setting up some charge or lien upon the property and not of resisting the confiscation, collateral proceedings may be taken suitable to the nature of the case.
11. A belligerent has the right to take such course and impose such conditions with regard to the confiscation of enemies' property, as it sees fit.

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**The Confiscation Cases.**

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12. The rights of a government against its own citizens in rebellion are not less but rather greater than those it may exercise towards a foreign enemy.
13. By the act of July 17, 1862, congress directed property to be seized and confiscated as enemies' property. A proceeding under this act is not, therefore, a criminal proceeding, and many rules which must be observed in criminal prosecutions have no application.
14. A libel of information filed for the confiscation of property as enemies' property which charges the acts of the owner of the property in the alternative, thus: "did act as an officer of the army or navy of the rebels in arms against the government of the United States, or as a member of congress, or as a cabinet officer of the so-called Confederate States," etc., is bad, for ambiguity and uncertainty, and in fact contains no charge at all, and a decree of confiscation rendered thereon by default will be reversed.
15. The general rule, that a judicial sale under a judgment which the court had jurisdiction to render, will stand, although the judgment itself be reversed for error, applies to sales made by virtue of a decree of confiscation.
16. The constitutional provision which declares that "no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted," does not apply to the confiscation of enemies' property even though those enemies be rebels against the government and, therefore, guilty of treason.
17. But under the confiscation act of July 17, 1862, as explained by the joint resolution of congress of the same date (12 Stat., 627), the forfeiture of real estate confiscated as enemies' property does not extend beyond the natural life of the party whose property is confiscated.

Heard on appeals from and writs of error to the district court for the district of Louisiana.

*Messrs. J. R. Beckwith*, U. S. Attorney, *L. M. Day* and *R. Waply*, for the United States.

*Messrs. T. J. Semmes*, *Robert Mott*, *Thos. A. Clark*, *T. L. Bayne*, *H. Renshaw, Jr.*, *A. Pitot*, *C. M. Conrad*, *C. A. Conrad*, *E. C. Billings*, *A. de B. Hughes*, *G. Breaux* and *C. E. Fenner*, for various defendants.

BRADLEY, Circuit Justice. Under the act of July 17, 1862, entitled "an act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," the marshal of the United States for

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the district of Louisiana, on the 15th of August, 1863, seized the property in question in this case, as the property of John Slidell; and on the 15th of September, 1863, the district attorney of the United States for the same district filed a libel or information for the confiscation of said property. The libel charges that Slidell, subsequently to the passage of the act, "did act as an officer of the army or navy of the rebels in arms against and government of the United States, or as a member of congress, or as a judge, or as a cabinet officer, or as a foreign minister, or as a commissioner of the so called Confederate States of America; or that, while owning property in a loyal state or territory, etc., he did give aid and comfort to the rebellion." Other charges were made against him of the same general character, and it was claimed, that by reason of the premises, the property described in the libel was forfeited to the United States, and ought to be condemned to their use; and prayed process against the property and the owner thereof, and all persons interested or claiming an interest therein, to warn them to appear and answer the information. Process was accordingly issued and duly published.

Several persons appeared and filed petitions of intervention, setting up title to certain portions of the land seized, or liens by way of mortgage or otherwise upon portions thereof.

John Arrowsmith claimed title to several squares in New Orleans as having been purchased by him many years before.

The Citizens' Bank of Louisiana claimed a mortgage upon a portion of the property to secure a stock note for \$4,104, due the first of June, 1863; and also a mortgage on another portion to secure it for advances upon a letter of credit given to Slidell on the 3d of September, 1861, upon Messrs. F. Ad. Marcuard & Co. of Paris, upon which he had drawn \$25,000, prior to the 13th of May, 1862. The latter mortgage was registered May 2, 1862.

F. A. Marcuard, a citizen of France, claimed a mortgage lien upon certain portions of the property to secure certain loans of money made by him to Slidell in Paris, namely, 250,000 francs, on the 4th of June, 1862, payable in one year,

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which mortgage was received at New Orleans by Eugene Rousseau, agent of Marcuard, July 14, 1862, and recorded on the same day, before the appointment of a register by Gen. Butler; and, afterwards, again recorded on the 29th of July, 1862, by a recorder appointed by him, and deposited with a notary, August 4, 1862; and again recorded, with the act of deposit, on the 9th of August, 1862. On the 11th of August, 1862, Gen. Butler issued an order for the confiscation of Slidell's property, and the rents were afterwards received by the military authorities on the property mortgaged.

Nicholson & Co. claimed a lien on certain property for laying the Nicholson pavement.

The state of Louisiana claimed a lien for certain taxes due.

Mrs. Gaines claimed to be the owner of certain lots specified in her petition.

The Merchants' Bank of New Orleans claimed a certain brick building in which their banking business had been carried on, and an equitable interest in the lot on which, etc., by virtue of a certain agreement.

Ortiz Huppenbauer, a tenant of two lots, claimed to have largely increased their value by making permanent improvements, and desired an equitable allowance therefor.

In the principal cause of confiscation a default was taken on the 18th of April, 1864; and a decree of condemnation rendered on the 18th of March, 1865.

Various proceedings were had and considerable evidence was taken upon the several interventions, and decrees were made by the district court in each case favorable or unfavorable to the claims presented. Amongst others, a decree was made July 7, 1865, dismissing the claim of the Citizens' Bank to a mortgage lien for 100,000 francs, or \$25,000, advanced upon their letter of credit given to Slidell in September, 1861. Another decree was rendered on the same day dismissing the claim of Marcuard to a mortgage lien for 250,000 francs lent to Slidell in Paris. On the 5th of May, 1866, the court dismissed the claim of the Merchants' Bank of New Orleans. From all these decrees appeals were regularly taken by the interveners;

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and one of the questions before this court is, whether an appeal lies in such cases. A motion has been made to dismiss the appeals on the ground that the proper remedy for revising the judgment or decree of the district court is a writ of error, and not an appeal.

It has undoubtedly been decided by the supreme court in the case of *Armstrong's Foundry* (6 Wall., 766) and other cases, that the proceedings for confiscation are proceedings at common law, and not in admiralty or equity; and, therefore, require a jury for the trial of issues of fact, and a writ of error to revise the judgment. This view is corroborated by the recent cases of *Garnett v. The United States*; *McVeigh v. The United States*, and *Miller v. The United States*, reported in 11 Wallace. But interventions of third parties, made during the course of the proceedings, setting up some claim to, or lien upon the property, are often in the nature of a bill in equity, and require an equitable proceeding to ascertain and establish the rights of the parties. They are especially so when they seek to establish a lien upon the property or any portion thereof, and to subject it or the proceeds of it to the payment of a debt or other claim having priority over the claim of the government, or constituting a legal charge upon the property when the cause of confiscation occurred. I conceive the claims of the interveners in this case, who have appealed as before stated, to be of this kind. Hence, in my judgment, no trial by jury was requisite in reference to those claims; and the decrees rendered in reference thereto are subject to appeal rather than to writ of error. Whether they would come up as outbranches of the record, and be subject to review upon a writ of error brought to the principal judgment in the case, it is, perhaps, unnecessary to decide. I hold, therefore, that the appeals taken in this case by the interveners above named were properly taken and should not be dismissed.

The next question is whether they were well taken. As the district judge has not assigned his reasons for dismissing the claims, I am somewhat at a loss to know the precise grounds on which his decision was founded. In the case of the *Citi-*

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*zen's Bank*, I presume the ground must have been that the letter of credit was manifestly given to Slidell to enable him to accomplish his mission to France in the service of the confederate cause. It has been repeatedly decided at the circuit, and, in the cause of *Hanauer v. Donne*, 12 Wall., 342, by the supreme court, that a contract made in furtherance of the rebellion or in aid of the confederate cause, is void, and cannot receive the aid of the courts. The furnishing of Slidell with a letter of credit when he went to Paris as the emissary of the Confederacy was so manifestly intended to subserve this end that I cannot disturb the decree dismissing the claim.

The case of Marcuard, however, is different from any which has yet been decided. The precedents have all been cases in which the transaction was between citizens of the United States, owing allegiance to the government thereof. But Marcuard was a citizen of France, and the loan made by him to Slidell was made in Paris. It was a loan of money made by a neutral on neutral territory, to an enemy, or, at most, to a citizen of the United States engaged in hostile operations against the United States. An innocent loan made to such a person, unless made for the purpose of enabling him to carry on hostilities, is a valid transaction everywhere. And the neutral is not bound to presume that such hostile use is to be made of the money loaned. One witness states that there was a general notoriety that Slidell was purchasing gunboats in Paris for the use of the Confederacy; but there is no direct evidence on the subject; and there is no evidence, except the amount of the loan, that the money was borrowed for other than private purposes. And the amount is hardly sufficient to throw the burden of proof on the lender. It seems to me that the case does not show sufficient evidence of notice to Marcuard, that any unlawful use was to be made of the money loaned by him, to defeat his claim.

Supposing the debt to be a valid one, was it a lien or a charge upon the property in question when the cause of confiscation occurred? This cause cannot be said to have occurred before the passage of the act of congress, July 17, 1862; but

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from that moment it existed, and the general rule is, that a judgment of confiscation relates back to the act which causes it. The question, then, is reduced to this: whether Marcuard's lien on the property in question had become complete on the 17th day of July, 1862? New Orleans was then in the possession of the United States forces. Military rule prevailed. All civil authority emanated from the power, or existed at the sufferance of the United States military authorities from the occupation of the city early in May, 1862. Could Slidell, a declared rebel and enemy, in Paris, during this period, transfer or incumber property located in New Orleans, within the military lines of the United States? If he could do it as to third persons, could he do it as to the United States? Had he been in the Confederacy he could not have done it at all. For in that case, every attempt to deal with property within the union lines would have been abortive and void. It was forbidden by public proclamation of the president, and by the usages of belligerents. Did his residence in France give any greater validity to his acts as against the government of the United States? In my judgment it did not. And Marcuard, in taking a mortgage from Slidell on property within the union lines, took the risk of the exercise by the government of the United States of its right as a sovereign power engaged in war, to confiscate the property of its enemies.

I am therefore of opinion, that the decree upon the intervention of Marcuard must be affirmed.

The next case is that of the Merchants' Bank of New Orleans. This company held a lease granted by Slidell in 1850 to John Robb & Co. for ten years, at a certain rent. The lessees covenanted to put up on the lots leased, buildings to cost at least \$15,000. At the end of the term, Slidell was to pay them the value of the buildings, at an appraisement. The bank claimed a lien by virtue of this contract, for the value of the buildings. The district court rejected the claim. It is difficult to see on what ground a lien for this sum can be maintained. The matter existed simply in covenant. The lease

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does not contain a word which looks like the creation or expectation of a lien on the property itself.

The bank complains that Fish, the purchaser of the property, was permitted to except to the intervention; whereas, he had no right to appear in the suit at all, because the sale had been suspended, and the marshal had not been ordered to proceed. But it matters not that Fish had no interest. The question is, Had the bank any interest? Fish, as *amicus curiæ*, might call the court's attention to the want of interest which the bank had. Unless the bank had a lien, the court cannot reverse the decree. In my judgment the bank had no lien, and therefore the decree is affirmed.

I have not adverted to certain general questions applicable to the entire proceedings for confiscation, because they have been settled by adjudications of the supreme court, made since the argument of these cases. That court has disposed of the constitutionality of the act, the power of congress to pass it, and the character of that part of it under which the proceedings are taken. In the case of *Miller v. The United States*, 11 Wall., 268, it has decided that the act has two distinct parts, each part having a separate object. The first four sections provide for the punishment of treason and rebellion as criminal offenses, and are permanent in their character. The remaining sections provide for the confiscation of the property of certain designated parties as enemies' property, and are temporary in their character, being intended for the purpose of insuring the speedy termination of the rebellion. The proceedings under these sections are proceedings *in rem*, conforming, as near as practicable, to proceedings in admiralty, in cases of admiralty and maritime jurisdiction; and to revenue cases, where the seizures are made on land. In the latter case after seizure, an information is filed by the law officer of the government, setting forth the facts upon which the confiscation is claimed. Whether the information is called a libel of information, or simply an information, is of no consequence. The same court has cognizance of the case whether it is an admiralty or a different revenue

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proceeding. The nature of the case determines its character. If a claimant of the property appears and contests the material facts alleged, as, for example, the guilt of the owner, or his ownership of the property, the issue is to be tried by a jury. If no person appears to answer the merits, a judgment is taken by default, and the court proceeds to examine witnesses or other evidence *ex parte*, by way of inquest, to ascertain the principal facts in the case. This examination does not require the intervention of a jury, being only intended to inform the conscience of the court. If a third person intervenes for the purpose of setting up some charge or lien upon the property, and not of resisting the confiscation, collateral proceedings are had, suitable to the nature of the case, as before stated. (See the cases of *Garnett*; *McVeigh*, and *Miller*, in 11 Wallace, and of *The Union Insurance Company*; *Armstrong's Foundry*, and *Hart*, in 6 Wallace.)

This general view of the nature of the proceedings will serve to answer, at once, many of the objections which were so elaborately argued when these cases were heard. A belligerent has a right to take such course, and impose such conditions, with regard to the confiscation of enemies' property, as it sees fit. The rules which it prescribes are not to be questioned by any code except the law of nations, and its own constitution. The rights of a government against its own citizens in insurrection are not less, but are rather greater than those it may exercise towards a foreign enemy. But in either case, the enemies' property may be confiscated simply as such, if the government so determine. Congress, by the act of July 17, 1862, 12 Stat., 587, directs property to be seized and confiscated as enemies' property; but only the property of certain classes of persons. This discrimination renders necessary, when issue is taken upon the information, an inquiry into the guilt or innocence of the owner; not for the purpose of a criminal conviction and sentence, but for the purpose of determining the status of the property seized. Hence many rules, constitutional and otherwise, which require to be observed in criminal prosecutions, have no application to these proceedings.

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The case is altogether unlike that of an attainder. There the criminal prosecution and conviction are the principal thing. The attainder, like disqualification to be a witness after conviction of perjury, follows as an incident of the conviction. Here the confiscation is the principal thing; and an inquiry into the acts or conduct of the owner of the property may, or may not, be required by the law. If it is required, it is only as a subsidiary thing, and involves no personal sentence or condemnation. Hence, all those objections which are founded on the necessity of a regular indictment, of the personal presence of the accused, of a trial by jury, etc., are out of place. Where the information is traversed, a trial by jury is necessary, it is true, but for another reason, and not because the proceeding is a criminal one; for the reason, namely, that the seventh amendment to the constitution requires a trial by jury in all suits at common law where the value in controversy exceeds twenty dollars.

These considerations render it unnecessary to examine more in detail the various points that were raised on the argument.

Having held the appeals taken by the Citizens' Bank, by Marcuard, and by the Merchants' Bank, to be properly taken, the several writs of error sued out by those parties will be dismissed.

The next case to be considered is the writ of error of John Slidell. The final judgment of condemnation was rendered on the 18th of March, 1865, and the writ of error was sued out on the 17th of March, 1870. It was sued out, therefore, just in time to save the statute of limitations. The supreme court, in the case of *McVeigh v. United States*, 11 Wall., 159, decided that the owner of the property, though a rebel and within the Confederate lines, was entitled to appear and contest the proceedings, or bring a writ of error upon the judgment. The writ, therefore, is regularly brought, and we are obliged to examine the record.

Many of the questions raised have been already disposed of, and need not be again adverted to. There is one objection, however, that has given me some trouble, namely, the insuffi-

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ciency of the information. It is one of the most remarkable specimens of loose pleading and uncertain statement that I remember ever to have seen. After having duly alleged the seizure of the property and fully described it, it states that John Slidell was, at the time of filing the information, and on the 17th of July, 1862, and previously, the owner thereof. Then, having stated the existence of the rebellion, and the passage of the confiscation act, it proceeds to allege :

“V. That the said John Slidell subsequently to the said 17th of July, 1862, did act as an officer of the army or navy of the rebels in arms against the government of the United States, or as a member of congress, or as a judge of a court, or as a cabinet officer, or as a foreign minister, or as a commissioner, or as a consul, of the so called Confederate States of America ; or, that, while owning property in a loyal state or territory of the United States, or of the District of Columbia, he did give aid and comfort to the rebellion against the United States, and did assist such rebellion.”

Now, from this allegation, can any mortal man tell what John Slidell did ?

The next article is of the same ambiguous and inconsequential nature.

The extreme ambiguity of these charges is something more than a matter of form ; it amounts to a substantial defect. There is, in truth, no charge at all. There is no charge that Slidell acted as a foreign minister of the Confederacy. The allegation is that he either did that or something else ; but we are not informed what. If the defect were one of form, it might be amended ; but being substantial, it seems to me it is fatal.

The other articles of the information do not save it. The seventh article alleges that John Slidell, subsequently to the 17th of July, 1862, within a state OR territory of the United States, was engaged in armed rebellion against the government, and did not within sixty days after the proclamation of the president, made on the 25th of July, 1862, cease to aid and

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abet such rebellion, etc. And the eighth article is of similar character to the seventh.

Now, not only is the same ambiguity kept up in these articles, as in the previous ones, but they do not set forth any of the offenses which, in the statute, are made the basis or cause of confiscation. They are evidently meant to be assigned under the 6th section of the act. But that section refers to persons who, in any state or territory of the United States, *other than those named as aforesaid*, were engaged in the rebellion. Now, the states named as *aforesaid* were the loyal states, which had just been named in the last clause of the 5th section. Therefore the states or territories, *other than those*, were the disloyal or rebellious states. So that the 6th section of the act only refers to persons who, within any disloyal or rebellious state or territory, were engaged in the rebellion. Yet the seventh article of the information merely alleges that John Slidell, *within a state or territory* of the United States, was engaged in rebellion. It does not make a charge within the statute.

The whole information, therefore, is substantially defective, and the judgment must be reversed.

The same defect is fatal to the judgments in the cases of *Charles M. Conrad v. The United States*, and in *Francis H. Hatch v. The United States*; and the judgments in those cases must also be reversed.

It is, perhaps, not necessary, at this time, to decide what will be the effect of reversing those judgments which have been reversed. But as the subsequent proceedings may depend on a solution of the question, and as the parties in interest will be desirous of knowing the position in which they stand, it is proper that I should give my opinion on the point.

It is a general rule that a judicial sale under a judgment which the court had jurisdiction to render will stand, although the judgment itself be subsequently reversed for error. I see no reason why that rule should not apply in these cases. It is true that a judgment of reversal usually contains a direction

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that the plaintiff in error be restored in all things to that which he hath lost by reason of the erroneous judgment. But the mode of making this restoration, where a sale of property has taken place under the reversed judgment is by awarding to the plaintiff in error the proceeds of the sale. This will be the proper course in these cases.

One question to which considerable attention was given upon the argument was, whether anything more than an estate for the life of the owner was transferred by the confiscation proceedings. Indeed, it was alleged as a ground of error that all the right, title and estate of the owner was condemned and sold. I do not regard this form of judgment as material; although on looking at the judgments, it will be found that the form of judgment pursued was, "that the said sixteen lots of ground, the property of A. B. be, and the same are hereby condemned as forfeited to the United States," without any definition or limitation of the estate forfeited. I regard the judgments as to be construed by the law which authorizes the confiscation to be made; and am of opinion, that the several sales by the marshal had the effect of transferring only such estate as it was lawful to sell. What that estate is, is the question. The joint resolution approved at the same time with the confiscation act provides, that no punishment or *proceedings* under the act shall be so construed as to work a forfeiture of the real estate of the offender beyond his natural life. It seems to me that this provision extends to the whole act, and to "the proceedings," for confiscation, as well as to the prosecution for the crimes of treason and rebellion. It may be very true, and I am inclined to think it is true, that the constitutional provision, which declares that no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted, does not apply to the confiscation of enemies' property, even though those enemies be rebels against the government and, therefore, guilty of treason. But whether it applies or not, congress, from respect to the scruples of the president, or for other reasons which seemed to it sufficient, did enact, as it had a right to do, that no proceedings under the

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**United States vs. Six Lots of Ground.**

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confiscation act should be so construed as to work a forfeiture of real estate beyond the natural life of the offender. And I can see no way in which this limitation can be confined to criminal proceedings under the act. It seems to me that by a fair interpretation, it extends to all proceedings by which a forfeiture is effected or adjudged.

**NOTE.**—These causes were heard on error by the supreme court of the United States at the October term, 1878. That court reversed the judgment in the Slidell case, holding that the information was sufficient after default made and final judgment of condemnation, and disposed of the other cases upon that view, affirming some and reversing others. See *The Confiscation Cases*, 20 Wall., 92.

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**UNITED STATES VS. SIX LOTS OF GROUND.**

1. The correspondence between a district attorney, representing the United States, and the attorney general, is confidential in its nature and cannot be cited by third persons.
2. If in the copy of a writ of error, lodged with the clerk of the court for the defendant in error, the return day of the writ is correctly stated, and the record be actually returned and filed in due time, a mere clerical error in the return day, in the original writ, is immaterial and is cured.
3. A district court of the United States cannot, three years after rendering a decree in a confiscation case, sit as a court of error upon its own decree and reverse it.
4. It is a general rule, that a judicial sale made by virtue of a judgment which the court had jurisdiction to render will stand, though the judgment itself be afterwards reversed for error.
5. Pardon and amnesty do not annul past transactions so far as to invalidate a previous judicial confiscation and sale of a claimant's property.
6. A pardon containing a condition, that the person to whom it was granted should not claim any of his property or the proceeds thereof, that had been sold by the order, judgment or decree of a court, under the confiscation laws of the United States, is a bar to his claim.
7. A pardon may be partial or subject to conditions, but the conditions must be lawful ones.

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United States vs. Six Lots of Ground.

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On error to the United States district court for the district of Louisiana.

*Mr. J. R. Beckmith*, U. S. Attorney, for the United States.  
*Messrs. T. J. Semmes and Robert Mott*, for claimant.

BRADLEY, Circuit Justice. This is a writ sued out by the United States to reverse a judgment of the district court, rendered June 27, 1868, dismissing the libel of information, and restoring to the claimant the property seized, which had been sold under a decree of confiscation rendered in the case in April, 1865.

A preliminary motion is made to dismiss the writ of error. This must be denied: (1.) The first ground assigned is, that the district attorney had been instructed by the attorney general to dismiss it. This, if proved, is no reason for dismissing the writ. The district attorney represents the United States, and the correspondence between him and the attorney general is confidential in its nature and cannot be cited by third persons. But I see no proof of the fact. (2.) The second ground is, that a writ of error does not lie in the case. This has been settled to the contrary by the supreme court. (3.) The third ground is, that the writ of error, being sued out in July, 1868, was made returnable on the first Monday of December then next; whereas, the next term of the court was to commence on the first Monday of November, and the citation was returnable generally to the next term. The error in the writ seems to have originated from using a blank printed writ intended for removing judgments to the supreme court, and is evidently a mere clerical oversight. A recent statute authorizes an amendment of the test and return of writs of error, and would probably authorize the amendment of this. But the copy of the writ, lodged with the clerk of the district court for the defendant in error, is correct, having the return day on the first Monday of November; and the record was actually returned and filed in this court before the first Monday in November. I think, therefore, that the defect is immaterial, and is cured.

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The error relied on by the government for a reversal of the judgment is this: that a regular default was made in the case, and entered on the 8th of September, 1863, and a decree of confiscation made, upon due proof, on the 5th of April, 1865; and that, upon this decree, a *venditioni exponas* issued on the 11th of April, 1865, under which the marshal regularly sold the property at auction on the 13th of June, 1865, and one Edward W. Burbank became the purchaser; and that the marshal executed a deed to said Burbank for the property. That the claimant did not apply to have the judgment opened and the sale set aside until March 4, 1868, nearly three years after the rendition of the judgment; that, nevertheless, the default was opened and the claimant was allowed to file a claim and answer on the 15th of April, 1868; and that, upon his pleading a pardon granted in October, 1865, and the proclamation of amnesty of September 7, 1867, and showing that he had taken the requisite oaths and performed the conditions required by the pardon and amnesty, the district court adjudged that the libel of information be dismissed, and the libelled property restored to the claimant upon the payment of all costs.

It is contended, on behalf of the government, that this last proceeding, in 1868, is entirely erroneous and without authority.

The counsel for the defendant in error attaches some importance to the fact that the decree of confiscation had, by consent, been partially opened before and set aside as to one of the lots seized. This took place before the sale by the marshal, on the application of a man by the name of Blum, who showed that he had long before purchased that lot from claimant. But I do not regard this transaction as having the slightest effect on the decree further than as it related to the lot claimed by Blum. The opening of the decree and the dismissal of the libel were expressly confined to that particular lot; and the decree remained in full force with regard to all the residue of the property.

And I do not perceive any error in the proceedings up to

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and including the decree of condemnation and sale. And, if there had been error, I do not think that the district court, three years after the rendering of the decree, could sit as a court of error upon its own decree, and reverse it.

But the court has done more. It has not only reversed its decree, but has made a decree to restore the property to the claimant after its sale under and by virtue of the decree. It is a general rule that a judicial sale, made by virtue of a judgment which the court had jurisdiction to render, will stand though the judgment itself be afterwards reversed for error. In my judgment the district court had no general authority, as at common law, thus to set aside its judgment regularly rendered and the judicial sale made by virtue thereof. If it had authority so to do, it must have been derived from the particular circumstances of the case as affected by the pardon and amnesty pleaded by the defendant.

Do such pardon and amnesty annul past transactions so far as to invalidate the previous judicial confiscation and sale of the claimant's property? Such a proposition seems to me utterly untenable on general principles. And, besides, the pardon itself, which was pleaded in this case, contained an express condition that the defendant should not claim any property or proceeds of any property that had been sold by the order, judgment or decree of a court under the confiscation laws of the United States. This condition is a bar to the defendant's claim. It has been repeatedly held that a pardon may be partial, or subject to conditions. Of course the condition must be a lawful one. As far as I can see, the condition in question is entirely free from any taint of illegality. Whether it would have been binding on the defendant if he could have shown that the confiscation proceedings were illegal and void, it is not necessary to decide. They were legal and valid when they were taken.

The order of the district court opening the default and the decree dismissing the information and restoring to the defendant in error the property sold, must be reversed, and the original decree of confiscation and the proceedings thereon must stand confirmed.

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Gaines vs. Agnelly and others.

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GAINES VS. AGNELLY and others. GAINES VS. OTHER DEFENDANTS.

1. The well known rule of chancery pleading, that if a defendant submits to answer, he shall answer fully to all matters of the bill, is abrogated, in cases where the defendant might by plea protect himself from such answer and discovery, and in his answer sets forth the matter of such plea as a bar to the merits of the bill, by the 89th rule in equity established by the supreme court of the United States.
2. Under the old equity, practice if a plea in bar was filed, and issue taken upon it, and that issue decided in complainant's favor, he was entitled to a decree without proving the allegations of his bill. If the same matters were set up in an answer, he was obliged to prove his bill; but in aid of such proof he was entitled to defendant's answer to the whole bill.
3. The new rule in equity practice (the 89th) which allows a defendant to set up a bar in his answer, and excuses him from answering further, still leaves the complainant under the burden of proving his bill, and takes from him the benefit of the defendant's answer; but the defendant is liable to be called as a witness in the cause.
4. Under the new rule in equity, 89th, where the answer sets up a bar to the whole bill, and claims the benefit of it, as a plea in bar, it is no longer a ground of exception, that it does not fully answer the allegations of the bill.
5. If the bar set up in the answer and claimed as such be insufficient, or if it be unsupported by proper averments, or by a proper answer to rebut allegations of the bill repugnant to the bar, the complainant may except for insufficiency, set the cause down on bill and answer only, or file a replication and proceed to proofs according to the exigencies of the case.
6. If the bar set up in the answer be insufficient as such, the complainant would be entitled to except as for want of a full answer; and to avoid answering the exceptions, the defendant in such case would require leave of the court before he could amend the bar. If instead of excepting, the complainant should go to proof, the burden would be on him to prove his bill, and on the defendant to prove his bar; each being entitled to examine the other as a witness. If however, he should set the cause down for hearing on bill and answer only, the answer would have to be taken as true, and the bar therein as proved; and though insufficient as a defense, the complainant could not have a decree, unless the answer admitted the allegations of the bill on which the prayer for relief was founded.
7. If the bar set up in the answer is a sufficient defense to the whole relief sought by the bill, it is immaterial whether the defendant answer the allegations of the bill or not. He is not bound to answer them; and the

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rule no longer applies that if the defendant does answer at all, even on matters outside of the bar, he must answer fully.

8. A plea which alleges just title, good faith, the requisite period of possession, and that possession continued peaceful and without interruption, sets out all the circumstances which the laws of Louisiana require to exist as the basis of a prescription.
9. If a title be obtained in good faith, and under the honest belief that the author was the real owner of the property, it is *prima facie* sufficient to lay the foundation of a prescription in good faith; any information, knowledge or belief to the contrary, obtained since the possession commenced, cannot under the laws of Louisiana impair the efficacy of such possession as a ground of prescription.

IN EQUITY. Heard on exceptions to the answer.

*Messrs. E. T. Merrick and J. Q. A. Fellows*, for complainant.

*Messrs. Miles Taylor and James McConnell*, for defendants.

BRADLEY, Circuit Justice. The complainant excepts to the answer of the defendants in this case for insufficiency. She complains that they have not to the best of their knowledge, information, remembrance and belief answered and set forth the matters required to be answered by the bill, especially those which were called for by the special interrogatories annexed to the bill.

The complainant claims certain lands, mostly in the city of New Orleans, which she alleges were the property of Daniel Clark at the time of his decease in 1813, were by him devised to her by a will dated July 13, 1813, and have since been taken possession of by the defendants. The bill describes the lands, sets out the will and the probate thereof granted in 1855, and calls upon the defendants severally to show the particular portions of property claimed by them. The bill also states several pretenses which it is supposed will be set up by the defendants: as first, title derived under a sale of the land by Richard Relf and Beverly Chew, executors of Daniel Clark under a prior will made in 1811, which was revoked by the will of 1813, and as attorneys of Mary Clark, the mother of Daniel Clark, who was devisee under the will of 1811; and secondly, prescription; but the bill charges that the sale by

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Relf and Chew was unauthorized and void, and would appear to be so on the face of the proceedings; all which must necessarily have been known to the defendants when they purchased. The defendants are called upon, according to the best of their knowledge, information, remembrance and belief to answer,

First. Whether the property described was not a part of the estate of Daniel Clark, of which he died seized?

Second. Whether the defendants, severally, claim to be owners of any portion of it? and if so, what portion, and by what right? setting forth metes, bounds and titles.

Third. How long the defendants have severally been in possession, and what revenue the property has yielded?

Fourth. Whether they have sold any part? if so, what, and for what consideration?

These are in substance the interrogatories annexed to the bill, and all the defendants are required to answer them.

The bill prays for a discovery of all the matters alleged, that the defendants may be decreed to hold the property as trustees for the complainant, may account for the rents and profits, and for general relief.

The answers on the point of Daniel Clark's ownership and seizin of the property described in the bill simply say in each case that the defendant has no knowledge whether said Daniel Clark did or did not hold the legal title thereto, and that therefore he cannot admit, but denies that Clark was seized or lawfully possessed of the same.

The answers then severally set forth and describe by metes and bounds the lands claimed by the defendants, with a statement of the immediate title of the defendants, making the answer and such antecedent acts of title from which the same was derived, as are sufficient to carry back the defendants' title far enough to set up prescription under the laws of Louisiana, with averments on information and belief, that the successive owners purchased in good faith, believing their vendors to be lawful owners of the property; and had continuous, uninterrupted and peaceable possession for the time requisite for the prescription pleaded.

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The answers further state that proceedings have been instituted in one of the state courts for a revocation of the probate of the will of 1818, under which Mrs. Gaines claims the property; that a decree of revocation has already been made in the court of first instance; and that an appeal from that decree to the supreme court has been taken and argued, and the case is now under the final consideration of that court; and the defendants claim that if the decree of revocation shall be affirmed, it will have the effect to deprive the complainant of all foundation of any right to the land claimed. And they pray that they may have the benefit of such decree if it shall be affirmed.

They submit that they are not bound in law to make any other or further answer to any matter or thing contained in the bill.

The answers fail to state, except as it may impliedly appear from the descriptions given by streets and by metes and bounds, whether the lands claimed by the defendants were or were not portions of the land described in the complainant's bill, or whether the defendants have any information or belief on the subject; or whether they have any information or belief on the question, whether the lands claimed by them belonged to Daniel Clark's estate, or to the lands of which he died seized, as set forth in the bill. The defendants were required to answer fully on these points, not merely upon personal knowledge (which at this day they could not be expected to have), but upon their information and belief as well.

The defendants, however, to obviate the force of this objection, refer to the 39th Rule in Equity, established by the supreme court of the United States, by which the well known rule of chancery pleading, that if a defendant submits to answer he shall answer fully to all matters of the bill, is abrogated in cases where the defendant might by plea protect himself from such answer and discovery; and in his answer sets forth the matter of such plea as a bar to the merits of the bill. The 39th rule declares that in such answer the defendant shall not be compellable to answer any other matters than he would be compellable to answer and discover upon filing a plea in bar

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and an answer in support of such plea, touching the matters set forth in the bill, to avoid or repel the bar or defense.

The defendants claim that prescription is such a bar, and that having set that up in their answer, they are excused from answering further.

Under the old practice if a plea in bar were filed, and issue taken upon it, and that issue were decided in the complainant's favor, he was entitled to a decree without proving the allegations of his bill. If the same matter were set up in an answer, he was obliged to prove his bill; but in aid of such proof he was entitled to defendant's answer to the whole bill. The new rule, which allows a defendant to set up a bar in his answer, and excuses him from answering further, still leaves the complainant under the burden of proving his bill, and takes from him the benefit of the defendant's answer. But this disadvantage is compensated for, in some degree, by the liability of the defendant to be called as a witness in the cause. Still, the general effect of the new rule being such as I have stated, it seems to be no longer a ground of exception, where the answer sets up a bar to the whole bill, and claims the benefit of it, as of a plea in bar, that it does not fully answer the allegations of the bill. If the bar set up and claimed as such be insufficient, or if it be unsupported by proper averments, or by a proper answer to rebut allegations of the bill repugnant to the bar, the complainant may except for insufficiency, set the cause down on bill and answer only, or file a replication and proceed to proofs, according to the exigency of the case. If the bar set up should be insufficient as such, I think the complainant would be entitled to except, as for want of a full answer, and to avoid answering the exceptions, the defendant, in such case, would require leave of the court before he could amend the bar set up in the answer. If, instead of excepting, the complainant should go to proofs, the burden would be on him to prove his bill, and on the defendant to prove his bar, each being entitled to examine the other as a witness. If, on the other hand, he should set the cause down for hearing on bill and answer only, the answer would have to be taken as true, and the

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bar therein as proved ; and though insufficient as a defense, the complainant could not have a decree unless the answer admitted those allegations of the bill, on which the prayer for relief was founded.

These are the general rules which seem to me to govern the pleadings in equity, as affected by the introduction of this new rule.

From this view of the subject, it is manifest that if the bar set up in the answer is a sufficient defense to the whole relief sought by the bill, it is immaterial whether the defendant answer the allegations of the bill or not. He is not bound to answer them, and the rule no longer applies, that if the defendant does answer at all, even on matters outside of the bar, he must answer fully. If that rule did apply, it would have the effect of converting the answer, in such a case, into a strict plea in bar. Any divergence of statement, any notice of the allegations of the bill outside of the strict line of the defense would be held a waiver of the bar, and would subject the defendant to the old burden of a full answer. I do not think that this would be a sound construction of the rule. If there are any authorities favoring this view, I should have been glad to have had a reference to them. As counsel has not produced any, I feel the greater confidence in the conclusions to which I have come.

The question then is, whether the bar set up is, by the laws of Louisiana, a sufficient defense, and whether it is sufficiently averred. And I do not understand the counsel of the complainant to contend that it is not. It seems to me that the bar is very fully and carefully drawn. It sets out all those circumstances which the laws of Louisiana require to exist as the basis of a prescription. Just title, good faith, the requisite period of possession, and that possession continued peaceably and without interruption. All these circumstances are fully alleged. And the defendant has also traversed the effect of the interruption of prescription resulting from the litigation referred to in the bill. How far the proofs, when taken, will sustain the defense, is another matter with which the court has at present no concern. Whether, if the complainant shows that

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the title of the defendants really originated in a void sale and conveyance by the executors of Daniel Clark, it will affect the defense, on the point of good faith, is a question I do not decide. In the case of *Gaines v. Hennen* and *Gaines v. New Orleans*, (24 Howard, and 6 Wallace), the answers admitted that the defendants obtained their title through the sales made by Relf and Chew; and the supreme court held that the illegality of the proceeding was apparent, and constituted a vice in the title, which took from the vendees all pretense of being purchasers or possessors in good faith; and that the interruptions in the prescription prevented its becoming a bar on any other ground. But in this case, the defendants do not set up any claim of title under the executors of Daniel Clark. They rely on certain titles, which they exhibit as just titles, and which they allege to have been obtained with good faith, and under the honest belief that the author was the real owner. This is, at least, *prima facie*, sufficient to lay the foundation of the prescription claimed. Any knowledge, information or belief, obtained since the possession commenced, to the effect that the property once belonged to Daniel Clark would not, as I understand the law of Louisiana, impair the efficacy of such possession, as a ground of prescription. The Code expressly says: "It is sufficient, if the possession has commenced in good faith; and if the possession should afterwards be held in bad faith, that shall not prevent the prescription." (Art. 8448.) Therefore, the allegations in the bill, that the property once belonged to Daniel Clark, and that he died seized thereof, are not inconsistent with or repugnant to the plea of prescription. Hence, any present knowledge or belief of the defendants on those points is perfectly immaterial. Their claim by prescription is independent of those facts, and perfectly consistent with them. These allegations, therefore, do not belong to that class of allegations which it is necessary for a defendant to meet and deny in order to support and maintain his plea in bar.

Had the bill charged that the defendants claimed title to the lands in their possession under Relf and Chew, acting as ex-

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ecutors of Daniel Clark, it might, perhaps, have been incumbent on the defendants to have cleared their possession of the imputation thus cast upon it. But no such charge is made in the bill. On the contrary, the bill expressly states that the complainant is ignorant of the title and claim of title by which the defendants severally hold; and calls upon the defendants to show their title. The defendants do show title sufficient to lay the foundation of a prescription; and on that defense they take their stand.

It seems to me that they are not called upon to answer further. The bar set up is *prima facie* a good defense; and the exceptions must be overruled.

As to the answers which the defendants have brought into court and now ask leave to file, I shall allow them to be filed as of the 6th of May instant, without prejudice to the complainant as to proceeding with proofs in the cause, and bringing it on for hearing.

As to those defendants who are in default and now apply for further time to answer, I shall grant a decree *pro confesso* against them, subject to this qualification and these terms, to wit: that during the taking of proofs in the cause, they shall be at liberty, severally, to file with the master or examiner and serve on the solicitor of the complainant, a description of the property which they claim, with the chain of title thereto extending back to the period at which the complainant claims it belonged to the estate of Daniel Clark; and to prove, if they can, a legal prescription for the same; subject also to this further qualification, that if, before the proofs are closed, the decree of the second district court of the parish of Orleans, in the case of *Joseph Fuentes et al. v. Myra Clark Gaines*, revoking the will of Daniel Clark of 1813, be affirmed by the supreme court of Louisiana, the said defendants may have the benefit of said decree for what it may be worth, as if they had pleaded the same. Provided, however, that any further answers of said defendants which may be filed before the first day of June next, may be filed as of the 6th day of May instant, as are mentioned in reference to answers above allowed to be filed as of said day.

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**Heine vs. The Levee Commissioners.**

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**HEINE VS. THE LEVEE COMMISSIONERS.**

1. When every part of a contract has been executed except the payment of money, the remedy at law (if one exists) is fully adequate to the case; for by an action at law it is precisely the unpaid money which is recovered, with, perhaps, damages for its detention.
2. A bill in equity against a board of levee commissioners to obtain, by means of the enforcement of the levy and collection of a tax by them, payment of money due on bonds, which they had issued under authority of an act of the legislature, and which directed them to levy an annual tax to pay the interest, and to create a sinking fund for the payment of the principal of the bonds, cannot be maintained as a bill to enforce the specific performance of a contract.
3. Nor can such a bill brought by the holders of the bonds against the board of levee commissioners be maintained as a bill for an account.
4. A court of equity has general jurisdiction of liens, inasmuch as a court of law cannot, except by execution, order a sale of the property which is subject to the lien, and cannot conveniently distribute the proceeds to those who may be entitled thereto.
5. The power of taxation belongs to the legislative department of the government. The judicial department has no general jurisdiction over the subject.
6. If officers who are charged with the duty of laying or collecting taxes, refuse to perform their functions, the courts, in a clear case of failure, and at the instance of a party directly interested, can, by the prerogative writ of *mandamus*, compel them to perform acts which are ministerial, as distinguished from those which are judicial or discretionary.
7. The power of compelling parties, after a judgment has been rendered, to pay the amount thereof, or of raising the money by the sale of their property, is an entirely distinct power from that of taxation, and is the special prerogative of the courts.
8. A bill praying that a board of levee commissioners, the state district judge or a receiver or commissioner to be appointed by the court, be required to levy a tax for the purpose of raising the money alleged to be due to complainants, in a case where no judgment has been obtained, cannot be maintained.

**IN EQUITY.** Heard on demurrer to the bill.

*Messrs. Thomas Allen Clark and Thomas L. Bayne, for complainant.*

*Messrs. John A. Campbell, S. R. Walker, C. L. Walker, J. C. Seale and J. E. Leonard, for defendants.*

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BRADLEY, Circuit Justice. This bill is filed by the holders of bonds issued by the levee commissioners, defendants, to compel them to levy a tax as required by law, to pay the interest due on said bonds, and the installments due on the sinking fund provided therefor. The defendants have filed a demurrer.

It is unnecessary to examine several interesting questions that were raised in the argument of the cause. It may be disposed of by a reference to the main point involved, the general equity of the bill.

The power of taxation belongs to the legislative branch of government. The judicial department has no general power over the subject. If the officers, who are charged with the duty of laying or collecting taxes, refuse to perform their functions, the courts, in a clear case of failure, and at the instance of a party directly interested, can, by the prerogative writ of *mandamus*, compel them to perform acts which are ministerial, as distinguished from those which are judicial or discretionary. This is all that the judicial department can do on the subject, unless the legislature has expressly conferred upon it further powers. No such power seems to have been conferred in the present case.

The power of compelling parties in judicial proceedings to pay sums of money awarded against them, or, of raising the money by a sale of their goods, lands and other assets, is an entirely distinct power from that of taxation, and is the special prerogative of the courts, by which they are enabled to enforce their judgments. But this power is never exercised until a judgment has been rendered; and is then exercised directly upon the person of the debtor, commanding him to pay, and attaching his person on his failure to comply; or directly upon his property by seizure and sale. In this case no judgment has been obtained; and the prayer of the bill is, not to issue an execution for the seizure and sale of the property, but to require the board of levee commissioners for the levee district in the parishes of Madison and Carroll, or the judge of the thirteenth judicial district, or a receiver or commissioners to be ap-

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pointed by the court, to levy a tax for the purpose of raising the money alleged to be due to the complainants.

I am not aware of any precedent for such a bill, and am of opinion that it cannot be maintained.

Where a political district is incorporated and becomes liable to pecuniary obligations, the corporation may be sued and judgment may be rendered for the debt. Execution may then issue against the property of the corporation; but if it have no property, the creditor has no remedy except to apply for legislative aid. The legislature usually extends its aid in such cases, by directing special proceedings to be had in order to raise the amount of the judgment by taxation. But no such legislation is referred to in this case.

The bill must be dismissed.

This cause was afterwards argued on a motion for rehearing by Mr. Clarke and Mr. Campbell at chambers, in Washington city, before Mr. Circuit Justice BRADLEY, who expressed his views of the case more fully in the following opinion:

The complainants are holders of certain bonds of the defendants, dated April 1, 1859, and issued about that period. They file this bill on behalf of themselves and other bondholders, for the purpose of obtaining payment of these bonds or the interest due thereon, by means of a tax to be assessed upon the levee district represented by the defendants, consisting of the alluvial lands of Madison and Carroll parishes, or for such other relief as the court can grant.

It appears by the bill, that on the 10th day of March, 1859, the legislature of Louisiana passed an act by which the board of levee commissioners for the levee district in the parishes of Madison and Carroll was invested with corporate powers, and authorized to issue bonds to the amount of \$400,000 to enable it to take up its outstanding liabilities. The bonds were not to run longer than eight years, and the board was directed to levy an annual tax on the district to pay the interest and create a sinking fund for meeting the principal; the tax to be five

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cents per acre on the alluvial lands, and a sufficient percentage on the state and mill tax to raise in the whole \$70,000 the first year, and \$65,000 the subsequent years. One of the New Orleans banks was to be selected as the fiscal agent of the board, to receive and disburse the moneys. If the levee commissioners should neglect to levy the tax, it was to be levied by the judge of the district, in connection with the several parish recorders. Under this act the board issued its bonds to the prescribed amount, and the proceeds thereof were applied to the purposes for which they were authorized; and the complainants became the holders of a large amount of the loan. The board assessed the prescribed tax in October, 1859, and in May, 1861, but no tax has ever been levied since, although repeated applications for that purpose have been made to the board and to the district judge. In March, 1867, the legislature, to relieve the parishes, authorized the board of levee commissioners to issue new bonds for the arrears of interest, and to extend original bonds for a period of twenty-five years; and reduced the annual assessment to \$55,000. This arrangement was accepted by the bondholders and carried out by the levee commissioners. But no money has ever been raised, and the levee commissioners have pretended to resign their offices; and as a corporation, they have no property on which execution can be levied. The bill prays for an account, and an assessment of the necessary tax for paying the arrears due on the bonds; and, in case of refusal on the part of the commissioners and the district judge, that commissioners or a receiver may be appointed by the court to levy the tax.

To this bill the defendants demurred, and on argument in May last, a decree was made dismissing the bill. A rehearing having been granted, the case has now again been argued before me.

At the first view it struck me as unusual to file a bill in equity for the mere collection of money due on a bond. The obvious remedy seemed to be an action at law. The allegation of apprehended difficulties in obtaining satisfaction of a judgment, if one were obtained, did not seem to me sufficient ex-

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cuse for omitting to obtain one. A decree for compelling the defendants to levy a tax seemed tantamount to a mandamus under a different name; and the alternative of appointing commissioners or a receiver to levy the tax under the discretion of the court, especially before the recovery of a judgment at law, seemed like an assumption of the taxing powers which belong exclusively to the legislative department.

But the counsel for the complainants has very strenuously insisted that there are grounds on which the bill may be sustained. Amongst others, he contends that it may be rested on the doctrine of specific performance; that the statute of 1859 raised an implied contract, on the part of the levee commissioners, to levy an annual tax for defraying the interest and the installments of the sinking fund accruing on the bonds; and that this contract could be specifically enforced.

It seems to me that the whole contract of the board with the complainants is contained in the bonds. It is simply a contract to pay money. It was the duty of the board, it is true, as officers of the levee district, to levy the tax. But this was a duty imposed by law — equivalent (and no more) to the duty of ordinary parish or county officers, to levy the necessary taxes for discharging the liabilities and meeting the wants of their several jurisdictions. The statute may be a contract on the part of the state with the bondholders; but it is not a contract on the part of the levee commissioners. It simply imposed on them an administrative duty as public officers.

Regarding the contract of the levee commissioners as a contract for the payment of money only, and binding at law, I can find no authority for decreeing its specific performance. The cases referred to, in which contracts for the purchase of stock, debts, and other chattels, have been enforced, have always had in them the circumstance of the defendant's refusal to accept the purchased articles and carry out his purchase. It was to enforce the purchase, and to obtain the price as a consequence, that the decree was sought. Had the articles been delivered and accepted, an action at law would have lain for

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the price, and chancery would have had no jurisdiction. The cases would then have been more like the present case—simply a claim for money on an executed consideration.

*Phrydis* The case of *Buxton v. Lister*, 3 Atk., 888, which was much relied on, was one in which the defendants repudiated their contract, by refusing to cut and take the timber which they had agreed to purchase, so that the complainant could not recover the price, but could only maintain an action for damages for the breach of the contract. Lord Hardwicke entertained the bill, which he would not have done for the mere recovery of the price. The other cases referred to under this head are all to the same effect. When every part of a contract has been executed except the payment of money, the remedy at law (if one exists) is fully adequate to the case; for by an action at law, it is precisely the unpaid money which is recovered, with, perhaps, damages for its detention. "The ground of this jurisdiction," says a late writer, referring to specific performance, "being the inadequacy of the remedy at law, it follows that where that remedy is adequate, chancery will not interfere to compel specific performance. It is on this ground that the court refuses generally to entertain suits in respect of government stock or chattels, and in all cases where the contract is satisfied by a mere payment of money." Fry on Specific Perf., p. 6.

But even if the bonds had contained a covenant to levy the tax prescribed by the statute, I question whether the contract could have been specifically enforced. It would have amounted to nothing more than a covenant to raise the money in a particular way, which (unless something be hypothecated or pledged) can hardly be a ground for a specific performance. Suppose that John Doe gives me his bond for ten thousand dollars, payable in ten equal annual installments, with interest, and agrees to raise the money by cutting the wood on five acres of his timber land each year, and fails to do it, can I file a bill for specific performance? Must I not sue at law on my bond? Does the special manner in which he agrees to raise

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the money lay any foundation for an equitable proceeding? I think it does not.

In my judgment, therefore, this bill cannot be sustained as a bill for a specific performance. If it could, why should not such a bill be resorted to for the collection of all debts against municipal corporations? Their liabilities have to be discharged by means of taxation, and it is the legal duty of their officers to lay the taxes to do it. Why compel their creditors to sue at law when they could take the short course of a bill to compel an assessment of taxes and payment at once?

Another ground on which it is urged that the bill may stand is, that of account. But I fail to perceive its admissibility. The fundamental idea of an account is, that the accountant has received moneys of the claimant which he ought to pay over. The moneys received by a bailiff, agent, receiver, trustee, etc., are not his own. They do not become his. They belong to his principal, and for them he should account. Mutual accounts of debts and credit have also (though somewhat inaccurately), been added to the general head of account. But, generally speaking, a mere debt is not ranked under that head; that is, it cannot be proceeded for by an action or a bill for an account. Now, here, there is nothing but a debt due. Nothing is charged to be held by the defendants for the complainant by way of agency, trust, or other fiduciary relation.

The *mandamus* cases referred to do not apply. In all the county bond cases cited from the reports of Howard and Wallace, judgments had been first obtained, and then writs of *mandamus* were sought to compel the county officers to perform their clear duty levying the tax requisite to pay the judgments. No *mandamus* is sought in this case, and if there were, none could be granted on this bill.

But the counsel for the complainants contend that they have a lien or privilege upon the lands of the levee district for the payment of these bonds, and that this court can enforce that lien. It is true, as supposed, that a court of equity has general jurisdiction of liens, inasmuch as a court of law cannot (ex-

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cept by execution) order a sale of the property which is subject to the lien, and cannot conveniently distribute the proceeds to those who may be entitled thereto. But I have not been able to perceive any lien or privilege existing in this case. The lands referred to are not under mortgage to the complainants. The act of 1859 does not make the bonds a lien on them. It only authorizes a tax to meet the installments accruing; and this tax is not directed to be levied solely on the lands; it is partly personal. By the general laws of the state, when these bonds were issued, it is true, riparian owners were bound to keep up and repair levees on, or in front of their lands; and in case of their failure so to do, it was made the duty of the police jury of the parish to have the necessary repairs made, either by a requisition on other planters in the neighborhood, or by adjudicating the work to the lowest bidder; and the parties doing the work (as well as the parish) had as security for repayment, a privilege on the property to whose levees the work was done in preference to other creditors. (Civil, Code art. 3216, act of 1829, secs. 31, 40.) But the special laws relating to the parishes of Madison and Carroll, took the duty of repairing the levees out of the hands of the riparian proprietors, and imposed it upon the board of levee commissioners subjecting the lands and inhabitants benefited to an annual tax to be assessed by the commissioners, for the purpose of raising a general fund to pay all expenses incident to all levee constructions and repairs in the district. Therefore the land owners are not delinquent as regards the levees. Their whole duty consists in paying the taxes when they are lawfully assessed; and the lands themselves are no longer subject to a lien or privilege for the work done.

What the court would do on a creditor's bill filed after judgment at law, to aid the complainants in obtaining satisfaction, is not now the question. Whether, if every effort to get an assessment made, should fail, the court would put forth its hand and find a remedy, or whether further legislation would be necessary to enable it to do so, I am not called upon to decide. I

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am satisfied that the bondholders, simply as such, have no equity upon this bill.

In this view of the case, it is unnecessary to examine the objection raised by the defendant's counsel against the claim of the complainants, on the ground that it is retrospective in its character, and that a retrospective tax (that is, a tax which ought to have been levied in previous years, and was not levied) cannot be levied. It may be remarked, however, that the English parish cases referred to as authority for this proposition are hardly applicable, inasmuch as there, the parish officers had no authority to borrow money on the credit of the parish, and, of course, none to raise a tax to pay loans. But, in this case, the legislature expressly authorized the loan to be made, and its authority to do so cannot be questioned.

I am still of opinion that the bill must be dismissed, and the decree is therefore affirmed.

The clerk will enter a decree accordingly.

NOTE. — This case has been affirmed by the supreme court of the United States. See 19 Wallace, 655.

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**BARCLAY VS. THE LEVEE COMMISSIONERS.**

1. The act of congress of 1867, which authorizes the removal of suits from a state court to the U. S. courts either by the plaintiff or the defendant, who shall make oath that he cannot have a fair trial on account of local prejudice and influence, overrides the provision of the 11th section of the judiciary act, which declares that those courts shall not have cognizance of any suit to recover the contents of any note or other chose in action in favor of an assignee, unless suit might have been prosecuted in such court to recover said contents, if no assignment had been made.
2. The provisions of the 11th section of the judiciary act in regard to suits in the U. S. courts on notes or other choses in action, held by assignment, was intended to prevent fraudulent assignments of choses in action, made for the purpose of giving the court jurisdiction; and was not founded on any constitutional principle.

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**Barclay vs. The Levee Commissioners.**

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**ACTION AT LAW.** Heard upon motion to dismiss the petition.  
*Messrs. E. T. Merrick, Geo. W. Race, W. H. Foster and T. S. McCoy*, for plaintiff.

*Messrs. S. R. and C. L. Walker*, for defendants.

**BRADLEY, Circuit Justice.** This suit was originally commenced in the thirteenth judicial district court of Louisiana, for the recovery of the amount due on a large number of warrants issued by the Board of Levee Commissioners, defendants, payable to the order of various persons, by whom they are indorsed. Suit was commenced by petition in 1867, and citation was duly served on the president of the board. In December, 1870, the police jury of the parish of Madison intervened, and prayed leave to defend the suit. The petition of intervention was afterwards withdrawn, and the plaintiff removed the suit to this court under the act of congress of February 5, 1867. (14 Stat., 385.)

In the original petition, the plaintiff was described as a resident of the city of New Orleans. By a supplemental and amended petition filed in this court after the removal of the cause, he states that that was a mistake of his attorney; that he is, and for many years has been a citizen and resident of the state of Tennessee, and he furnished his own affidavit and the affidavit of others to show the truth of this allegation. By his amended petition he also makes the police juries of the parishes of Madison and Carroll, parties defendants in the suit, and prays for judgment against them, as well as against the Board of Levee Commissioners.

The defendants move to dismiss the petition on several grounds:

First. That the parties are not such as to give this court jurisdiction. The plaintiff has shown that he is a citizen of Tennessee, and was so when the suit was originally commenced, and the defendants being political, or *quasi* political corporations of Louisiana, are necessarily citizens of the latter state. So far as citizenship of the parties goes, therefore, the court has jurisdiction.

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**Barclay vs. The Levee Commissioners.**

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Second. It is urged that the form of the security sued on is such that this court has no jurisdiction of the case, and for this point the defendants rely on the 11th section of the judiciary act of 1789, which declares that no district or circuit court of the United States shall have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless suit might have been prosecuted in such court to recover said contents, if no assignment had been made. This case undoubtedly comes within the purview of that section. But the plaintiff contends that the act of 1867, which authorizes the removal of suits from a state court either by the plaintiff or defendant, who shall make oath that he cannot have a fair trial on account of local prejudice and influence, overrides this provision of the 11th section of the judiciary act. And I am inclined to think that this position is correct. The provision referred to was intended to prevent fraudulent assignments of choses in action made for the mere purpose of giving the court jurisdiction, and was not founded on any constitutional principle. As the act of 1867 is general in its terms, and gives the right of removal in all cases without exception where the parties are citizens of different states, I do not think it necessary to import into it an exception grounded on the 11th section of the judiciary act.

Third. The defendants contend that as against the police juries of Madison and Carroll, the action is an original one, and therefore that the judiciary act applies as to them. If the original action was properly removed, and if the addition of these parties was a matter properly incident thereto, I think the objection cannot prevail. But I cannot see how those police juries are proper parties in the case. I do not see how one corporation can be made liable for the debts and obligations of another without a voluntary assumption thereof. But this is, perhaps, a matter more proper to come up on the trial of the cause, when the plaintiff may be prepared with evidence to show their liability. I shall not dismiss the cause as to them, if the plaintiff sees fit to continue them in it.

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**Goddard, Assignee, vs. Weaver.**

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Some other objections of a technical nature were made, which it is not necessary to notice.

If the defendant's existence as a corporation has ceased, the plaintiff's judgment will be a vain thing. I see no evidence, however, that it has ceased ; nor any evidence which convinces me that process has not been properly served upon it.

The motion to dismiss is denied.

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**GODDARD, Assignee, vs. WEAVER.**

1. Where an honest execution is issued against a bankrupt and levied upon his property before a petition for bankruptcy has been filed, the filing of such a petition does not render the execution and all the proceedings under it null and void.
2. The assignee of a bankrupt is not the assignee of his creditors; he takes only the bankrupt's interest in property; he has no right or title to the interest which others have therein, nor any control over it, further than is expressly given to him by the bankrupt act as auxiliary to the preservation of the bankrupt's interest for the benefit of his general creditors.
3. If, at the commencement of proceedings in bankruptcy, the bankrupt has possession of property subject to certain fixed liens, the assignee succeeds to his possession, and may discharge the liens and dispose of the property for the benefit of the general creditors; or, perhaps, he may sell the property before discharging the liens, and distribute the proceeds in the order of priority of the claims upon them.
4. If, at the commencement of proceedings in bankruptcy, the bankrupt has not possession of a particular property except as bailee, but the same is in the hands of the sheriff under an execution and levy, the assignee cannot take such property out of the sheriff's hands without paying the debt, or seeking the aid of the United States district or circuit court sitting in bankruptcy.
5. If, in such case, the sheriff proceed to sell the property, there is nothing in the bankrupt act which renders void his acts done after the commencement of proceedings in bankruptcy. The possession of the sheriff is a lawful possession; he has a species of property in the thing.
6. The right of the sheriff, in such case to sell, extends to the entire interest of the debtor, and no assignment of that interest in bankruptcy or otherwise can divest the right of the sheriff.

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**Goddard, Assignee, vs. Weaver.**

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7. If the assignee can show that the exercise of this right by the sheriff will materially affect the interests of the general creditors, the court will interfere, but not otherwise; it would do this if the bankrupt's interest was only that of a coproprietor, and the others were about to do any act to the property by which the bankrupt's interest would be sacrificed or compromised.
8. When divers persons have divers interests in the same thing, neither has a right to do what will injure the others; and each must submit to judicial restraint imposed for the protection of the others' interests.
9. When any question is made as to the validity of the judgment under which proceedings are being had, the bankrupt court is the appropriate tribunal to investigate it; and proceedings under the judgment will be restrained as a matter of course, until that question is settled.

**BILL** in EQUITY, submitted on motion for the allowance of an injunction and the appointment of a receiver.

*Messrs. Wm. M. Randolph and M. M. Cohen*, for complainant.

*Mr. Wm. H. Hunt*, for defendant.

BRADLEY, Circuit Justice. On the 25th of November, 1871, Joseph D. Weaver filed in the 5th district court of the parish of Orleans, a petition for executory process against one Francis M. Fisk for the seizure and sale of certain buildings and improvements in the city of New Orleans, upon and in virtue of certain acts of mortgage importing confession of judgment passed, one in 1866, and the other in 1868. On the 27th of November, 1871, an order of seizure and sale was made, an execution was duly issued to the sheriff of the parish, who levied upon and advertised the property for sale. Afterwards, on the 27th of December, 1871, the said Fisk filed in the district court for the eastern district of New York, a petition to be declared a bankrupt, and was declared such accordingly. The sheriff's sale, however, took place on the 6th of January, 1872, in pursuance of this advertisment, and Weaver became the purchaser of the property for the price \$16,200, a little less than the amount due him for principal, interests and costs.

The complainant who became assignee in bankruptcy of Fisk has filed this bill to set aside the sheriff's sale, and now

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moves for the appointment of a receiver to take possession of the property, and receive the rents and profits during the pendency of the suit, and for an injunction to prevent Weaver from intermeddling therewith. The gravamen of the bill is, that the sale was made after adjudication in bankruptcy, that Weaver, the purchaser, knew of such adjudication, and urged forward the sale, notwithstanding an order of the district court of New York to suspend proceedings, and that the property sold for less than its value, having been sold for \$16,200, when it was worth \$25,000. The defendant has filed an answer, in which he positively denies that he knew of the proceedings in bankruptcy at the time of the sale, denies that the property was worth more than he bid for it, and avers that the sale was made in good faith.

It is admitted, however, by the defendant, that before the sale a paper was served on him purporting to be a copy of a decree in bankruptcy against Fisk, and another paper purporting to be a copy of an order of the New York district court, directing him to suspend proceedings in the collection of his claim; but neither paper was authenticated in any manner, and both he and his counsel believed them to be spurious, and a ruse on the part of Fisk to prevent the sale; and the fifth district court of the parish of Orleans, being applied to on behalf of Fisk, to stay proceedings, refused to do so upon the unauthenticated papers which were served.

In relation to the value of the property sold, the defendant is corroborated by the affidavits of several respectable witnesses.

The first question arising upon the case is, whether as mere matter of law, all proceedings of the sheriff taken and had after the petition in bankruptcy was filed were null and void.

It is contended that they were null and void, because repugnant to that exclusive control over bankrupt's property which is vested in the bankrupt court. I cannot agree to this proposition.

Where an honest execution is issued against a bankrupt and levied upon his property before any petition for declaring

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him a bankrupt has been filed, I cannot subscribe to the doctrine that the filing of such a petition renders the execution and all the proceedings under it, null and void. The assignee of a bankrupt is not the assignee of his creditors. He is not the assignee of all the judgments, executions, liens and mortgages outstanding against the bankrupt's property. He takes only the bankrupt's interest in property; he has no right or title to the interest which other parties have therein, nor any control over the same, farther than is expressly given to him by the bankrupt act, as auxilliary to the preservation of the bankrupt's interest for the benefit of his general creditors. It would be absurd to contend that the assignee in bankruptcy becomes *ipso facto* seized and possessed in entirety, as trustee of every article of property in which the bankrupt has any interest or share. This would give him the king's prerogative which brooks not a divided dominion in property in common with a subject.

If at the commencement of the proceedings in bankruptcy, the bankrupt has possession of property, subject to certain fixed liens, the assignee succeeds to his possession and may discharge the liens and dispose of the property for the benefit of the general creditors; or perhaps he may sell the property before discharging the liens and distribute the proceeds in the order of priority of the claims upon them. Whether in all cases he could do this, it is not necessary to decide.

But if at the commencement of the proceedings in bankruptcy, the bankrupt has not possession of a particular property except as bailee, but the same is in the hands of the sheriff under an execution and levy, I know of no authority which the assignee has to take such property out of the sheriff's hands without paying the debt, or seeking the aid of the district or circuit court sitting in bankruptcy.

And if the sheriff proceeds to sell the property, I am unable to see anything in the bankrupt act which renders void his acts done after the commencement of proceedings in bankruptcy. The possession of the sheriff is a lawful possession. He has a species of property in the thing.

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Goddard, Assignee, vs. Weaver.

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His right to sell extends to the entire interest of the debtor, and no assignment of that interest in bankruptcy or otherwise can divest this right of the sheriff. If the exercise of the right would materially affect the interests of the general creditors, and the assignee can show this, the court will interfere, but not otherwise. It would do this if the bankrupt's interest was only that of a coproprietary and the other coproprietors were about to do any act to the property by which the bankrupt's interest would be sacrificed or compromitted.

When divers persons have divers interests in the same thing, neither has a right to do what will injure the others; and each must submit to judicial restraint imposed for the protection of the others' interests.

It is upon this principle that courts are authorized to interfere with rights otherwise lawful in regard to property situated as I have supposed. Whilst, therefore, I have no doubt of the court's authority to stay the sheriff's proceedings in such a case, and even to set aside the sale when it can be done without injustice to third parties, I cannot regard the sheriff's acts as absolutely void in law, nor even as voidable, or subject to control, except upon cause shown in a court having bankruptcy jurisdiction. Of course when any question is made as to the validity of the judgment, the bankrupt court is the appropriate tribunal to investigate it; and proceedings under the judgment will be restrained as a matter of course until that question is settled. But in the case before us, no question is made as to the *bona fides* of the act on which executory process is issued, nor of its validity in any respect. The answer has fully disposed of any charge of bad faith, and of the allegations as to the value of the property. Under the circumstances of this case, I do not think that I ought to appoint a receiver, or to issue an injunction.

The motion is denied.

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Haines vs. Carpenter, Ex'r,

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NOVEMBER TERM, 1872.

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HAINES VS. CARPENTER, Ex'r.

1. Where an executor has qualified and given bond for the faithful discharge of his trust, and taken possession of the property of the estate by virtue of the provisions of the will, a strong case must be made against him to induce the court to appoint a receiver to take the possession of the property from him.
2. The application for a receiver must be supported by evidence showing that the appointment is necessary.
3. The verification by complainant of a bill stating upon information and belief, grounds for the appointment of a receiver, is not of itself such evidence as would justify the appointment by the court.
4. In an application to discharge a trustee, and for the appointment of a receiver for the trust estate, it must be made to appear that the property is in danger and that the trustee is irresponsible.
5. A bill which united a controversy raised by the heirs of testatrix touching the validity of the bequests in the will, with the claims of the heirs of the husband of testatrix to the property bequeathed by the will, and with the suit of a creditor seeking judgment against the succession, and with a demand for an account to be rendered by the executor, was held to be multifarious.
6. Courts of equity will not allow a multifarious bill as a remedy for a multiplicity of suits.
7. Where two courts have concurrent jurisdiction, the one which first obtains actual jurisdiction of the parties and subject matter is entitled to proceed to final adjudication, and neither party can be forced into another forum, except as provided by the acts of congress for the removal of causes from the state to the federal courts.
8. The effect of the case of *Payne v. Hook*, 7 Wallace, 425, considered.
9. Where the purpose of a bill is not to obtain possession of a particular thing bequeathed, but to establish the validity of the bequest, a demand for the particular legacy is not a necessary preliminary to the suit, under art. 1626 of the Code of Louisiana.

IN EQUITY. This cause was submitted upon a motion by complainant for the appointment of a receiver, and at the same time upon the demurrer of defendants to the bill.

*Messrs. Harris & Harris, E. C. Billings and A. de B. Hughes,* for complainant.

*Messrs. Given Campbell and E. T. Merrick,* for defendants.

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Haines vs. Carpenter, Ex'r.

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WOODS, Circuit Judge. The bill alleges in substance that complainants are trustees of the Vicksburg Baptist Church of Vicksburg, in the state of Mississippi, a body corporate under the laws of that state; that Celia A. Graves, late of Madison parish in the state of Louisiana, by her last will and testament, dated January 27, 1872, bequeathed to the said church a certain plantation known as "Willow Glen," situate in said parish of Madison, and of the value of about \$24,000; that by said will Charles Carpenter was constituted universal legatee and given seizure of testatrix's estate and nominated and appointed executor; that Celia A. Graves departed this life in February, 1872, and her succession was opened in said parish, her last will and testament duly proven and admitted to record, and Carpenter qualified as executor, and that the estate and property of testatrix, including the said plantation, are in the hands of Carpenter as executor; that complainants are informed and believe that said Carpenter is wholly unfit and incompetent to manage and control the estate in such a way as will best secure the benefit and advantage of the succession; that it was his duty as executor to take immediate personal control and supervision of all the affairs of the succession, yet he has depended upon others to manage and direct its affairs, from which facts it is charged that the succession is liable, in the hands of the executor, to go to waste and be greatly damaged and decreased in value.

That the executor is endeavoring to defeat the bequest made to said Baptist Church, by depreciating the value of the estate, and by confederating with one Elias S. Dennis, to institute fictitious suits against himself as executor, in order to sweep away the assets of the estate and to consume the succession in the payment of the judgments thus obtained.

That Dennis, with the knowledge and consent of the executor, has instituted a suit in the district court for the parish of Madison, in Louisiana, against the executor, by which he seeks to recover a large amount claimed to be due him as partner of the testatrix. Complainants charge that they will be able to prove, as they are informed and believe, that Dennis was not

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Haines vs. Carpenter, Ex'r.

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the partner but merely the agent of testatrix, and that he is not entitled to recover in his suit, and that a fraudulent design exists between the executor and Dennis in reference to said suit.

That Mary Stout and others, representing themselves to be the only heirs at law of testatrix, have instituted a suit in the parish court for the parish of Madison, in which they claim that the bequest to the church and all other bequests in the bill, except the one to John A. Klein, were null and void, charging illegal and fraudulent conduct on the part of the executor and Dennis, and praying that said bequests be declared null and void and petitioners put in possession of the succession, and that complainants in their corporate capacity had appeared and filed an answer in said cause.

That Richard H. Graves and others, claiming to be the only heirs at law of George W. Graves, who was the husband of testatrix, have filed their petition in the district court for the parish of Madison, in which they claim all the estate which belonged to said George W. Graves at his decease, and that the property bequeathed by testatrix was in fact the property of George W. Graves, and that the will of testatrix was null and void, and conveyed no right or title to any property to the legatees therein named, and praying that said will be declared null and void, and petitioners placed in possession of said property.

The bill further alleges that said will is in all respects legal and valid; that it contains nothing in conflict with either the laws of Mississippi or Louisiana.

The bill makes Carpenter, in his capacity as executor, Dennis, the legatees under the will, and the heirs at law of both Celia A. Graves and George W. Graves, defendants, and prays that Carpenter may be required to file in this court his accounts as executor, and to pay into court all amounts received by him and now remaining in his hands; that a master may be appointed, to whom all claims against the succession of Celia A. Graves may be referred, and to whom all creditors may be required to make proof thereof, and that claims not

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Haines vs. Carpenter, Ex'r.

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presented to him shall be barred; and that the master shall report to this court; that a receiver may be appointed, who shall take immediate possession of all property, real and personal, belonging to said succession, wheresoever the same may be found; that payment may be made of all claims which this court shall find to be just and valid claims against said succession, and all others rejected; that a decree may be entered by this court, declaring the validity of said will, and after the payment of all just debts of said succession, ordering the receiver to place complainants in full possession of the property bequeathed to the Baptist Church, as well also as the payment of all the legacies named in the will, and direct, by said decree, the full and final administration of the succession; and that the possession of the property of the succession may be taken from Carpenter, the executor.

The bill also prays for an injunction to restrain defendants or any of them from prosecuting any suit affecting said succession or the interests of said church in said succession, and especially from further prosecuting the said suits in the state courts of Louisiana above mentioned.

The bill is demurred to on several grounds:

1. Because it is multifarious.

2. Because the bill shows that the state courts of Louisiana were seized of jurisdiction of the question of the validity of said will, and that the property in question was in the custody of the state courts, and in the process of administration by them.

The first question to be considered is: Ought the court, upon the case made, to appoint a receiver?

The party in possession of the property for which a receiver is asked is the executor named in the will of the testatrix, who has qualified in the probate court and given bond for the faithful discharge of his trust. Under these circumstances the court should not displace him upon light grounds. *Beverly v. Brooke*, 4 Grattan, 208. And though a suit be instituted by a party having an interest in the estate, it does not follow that the trust created by the testator is to be set aside. A strong

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**Haines vs. Carpenter, Ex'r.**

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case must be made out to induce the court to dispossess a trustee or executor who is willing to act. Kerr on Receivers, 19; *Smith v. Smith*, 2 Younge & Collyer, 361; *Bainbridge v. Blair*, 4 L. J. Ch., N. S., 207.

The grounds upon which this court is asked to dispossess the executor and turn over the property of the succession to a trustee are, that Carpenter, the executor, is unfit and incompetent to manage and successfully control the estate; that he has only cultivated a part of the land susceptible of cultivation, when, in the opinion of the complainants, all of it should have been cultivated; that he is endeavoring to defeat the bequest to the said Baptist Church, by depreciating the value of the estate, and that he is confederating with said Elias S. Dennis to institute fictitious suits against the estate in order to sweep away its assets.

These charges are not directly made, but are stated on the information and belief of complainants, and they are not supported by a single affidavit to any fact.

The application to appoint a receiver must be supported by evidence showing that the appointment is necessary. *Middleton v. Dodswell*, 13 Vesey, jr., 266.

There is absolutely no testimony to support the application in this case. It is true that one of the complainants swears to the bill, but in doing so he only swears that he has been informed of and believes certain statements in his bill. This is not evidence, and gives no support to the application.

The fact is that the court is asked to appoint a receiver in this case on mere rumor, without any proof showing the necessity of the appointment.

But even if the fact were established that the trust property was in danger, that of itself would not be sufficient. It must be further shown that the party in possession is irresponsible. *Willis v. Corlies*, 2 Edw. Ch., 281; *Clark v. Ridgely*, 1 Maryland Ch. Dec., 70; *Blondheim v. Moore*, 11 Md., 365; *Burt v. Burt*, 41 N. Y., 46; *Haggerty v. Pittman*, 1 Paige Ch., 298. There is no proof that the executor is irresponsible, or his bond insufficient, nor is there any averment in the bill to that effect.

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Haines vs. Carpenter, Ex'r.

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The motion for a receiver must therefore be overruled.

Let us next consider the grounds of demurrer to the bill. Several of these grounds appear to be well taken.

The most obvious objection to the bill is that it is multifarious. "By multifariousness is meant the improperly joining in one bill, distinct and independent matters and thereby confounding them; as, for example, by uniting in one bill several matters perfectly distinct and unconnected against one defendant, or the demand of several matters of a distinct and independent matter against several defendants in the same bill."

1 Cooper's Eq. Pl., 182; *Saxton v. Davis*, 18 Ves., jr., 72.

In this bill the controversy raised by the heirs at law of the testatrix, touching the validity of the bequests of the will, is united with the claim of the heirs of George W. Graves, the husband of testatrix, to the property disposed of by the will; they claiming that the property descended to them, and did not belong to the testatrix, and could not therefore pass by her will, and with the suit of Elias W. Dennis, a creditor of the succession, whereby he seeks to recover judgment against the estate, and with a demand for an account to be rendered by the executor.

I do not think the adjudged cases furnish a better illustration of a multifarious bill.

A bill by a creditor sought an account against an executor and trustee of the testator's estate, and also to set aside a sale made by the executor and trustee to a purchaser who was made a party to the bill; it was held demurrable for multifariousness, for the purchaser had nothing to do with the general settlement of the accounts of the estate, and ought not to be involved in any litigation respecting it. *Salvidge v. Ryde*, Jacob, 151.

So when devisees and legatees brought a bill against the trustees and executors under the will and against a mortgagee of part of the estates, alleging collusion between the trustees and executors and the mortgagee, and that they refused to compel the mortgagee to account for the rents and profits, or to redeem the mortgage, and the bill prayed for an account of

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the testator's effects, and that the mortgage might be redeemed; the bill was held on demurrer by the mortgagee to be multifarious, for the mortgagee had nothing to do with the general settlement of the accounts of the estate. *Pearse v. Hewett*, 7 Sim., 471.

✓ The cases where unconnected parties are allowed to be joined in a suit are where there is one common interest among them all, centering in the point in issue in the cause. *Ward v. Duke of Northumberland*, 2 Anst., 469.

Now in the case under consideration, the heirs of George W. Graves have no interest in the controversy between the heirs of the testatrix and her executor, and the devisees under the will, for they claim as heirs of the husband of the testatrix, and their claim would not be affected, no matter how that controversy might end; neither are they interested in the accounts of the executor, as such, nor in the controversy between Dennis and the executor. Neither is Dennis a creditor interested in the issue between the devisees and the heirs of the testatrix nor in the general accounts of the executor, nor in the claim of the heirs of George W. Graves to the property of the testatrix.

In this bill a creditor is called on to litigate his claim against the estate, in connection with a controversy about the validity of certain bequests in the will, and a trial of the right of property between the executor and the heirs of a third party. Is not this "the uniting of several matters of a distinct and independent nature against several defendants in the same bill?"

In my judgment, therefore, the bill is multifarious.

✓ It is further alleged, as ground of demurrer to the bill, that the bill itself shows that the state courts of Louisiana were seized of jurisdiction of the question of the validity of said will, and that the property in question was in the custody of said state courts and in process of administration by them before the filing of this bill.

When two courts have concurrent jurisdiction, the one which first obtains possession of the subject must adjudicate, and neither party can be forced into another jurisdiction. *Smith v. McIver*, 9 Wheat., 532; *Shelby v. Bacon*, 10 How., 56; *Tay-*

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*lor v. Carrol*, 20 id., 583; *Peale v. Phipps*, 14 id., 368; *Mallet v. Dexter*, 1 Curtis, 178.

The jurisdiction of the probate court of the parish of Madison, to pass upon the validity of the bequests in the will of Celia A. Graves, is unquestioned. That court, before the filing of this bill, had entertained a cause in which the validity of said bequests was litigated, and the complainants in this case had entered their appearance therein, and filed their answer. What right has this court to interfere, and draw that controversy to itself, or forbid the parties from litigating the question in the *forum* of their choice, which has ample jurisdiction to adjudicate it?

No reason is given in the bill why this court should so interfere. No collusion is alleged between the executors and the heirs of Celia A. Graves. True, it is averred that from local prejudice complainants cannot get justice in the Madison parish court. That might prove a ground for the removal of the cause in the parish court to this court, if the subject matter of the controversy was such that this court would have jurisdiction, but it is no reason for enjoining the proceedings in the parish court by a new and original suit commenced in this.

The property of the succession of Celia A. Graves is in *gremio legis*; the jurisdiction of the parish court has attached to the assets; they are in the hands of a trustee, who is required to account only to the court which appointed him, and this court has no power to take the assets from the possession of that trustee and compel him to account here. ✓

The case of *Payne v. Hook*, 7 Wallace, 425, is much relied on to sustain the jurisdiction of this court to grant the relief prayed by this bill. But the purpose of the bill in that case was only to recover the share of a distributee against the estate, and to compel an account to show what that share was. It does not appear that the bill in this case sought to remove the administrator appointed by the state court, and to take the assets from his hands and place them in the hands of a receiver who should be charged with the duty of being administrator; in short, to transfer the administration thereof to the federal

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Haines vs. Carpenter, Ex'r.

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courts. No case can be found where a court of the United States has assumed to go the length required by this bill.

In the case of *Peale v. Phipps*, 14 How., 376, the court in speaking of the case of *Erwin v. Lowry*, 7 How., 172, say of the proceedings of the United States court in that case, that "they were made to enforce a lien created by the testator in his lifetime, and consequently could not interfere with the duties of the curator or the authority of the state court under which he was acting, and to which he was bound to account."

The spirit of this remark applies to the case of *Payne v. Hook*, and I am of opinion that that case is not an authority to sustain this bill.

In the argument of the demurrer the prevention of a multiplicity of suits was stated to be one of the grounds of equity in the bill. But courts of equity do not allow a multifarious bill as a remedy for the multiplicity of suits.

The objection to the bill that complainants have never demanded their legacy and their right has never been recognized by executor does not appear to be well taken.

Article 1626 of the code of 1870 declares that "every legacy under a particular title gives to the legatee from the day of the testator's death a right to the thing bequeathed, which right may be transmitted to his heirs or assigns. Nevertheless the particular legatee can take possession of the thing bequeathed, or claim the proceeds or interest thereof only from the day the demand of delivery was formed," etc.

The purpose of this bill being not to obtain possession of the thing bequeathed, but to establish the validity of the bequest, it does not appear that a demand made is a necessary preliminary to the suit.

The bill is demurrable for multifariousness and for want of jurisdiction in this court to grant the relief prayed, and on these grounds the demurrer is sustained.

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Werk vs. Leathers.

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## WERK VS. LEATHERS.

1. Ordinarily, a ship is presumed to be seaworthy. But this presumption is rebutted by proof that she is old and approaching the end of her life as a ship, and that she suddenly failed in a vital part without any apparent cause.
2. The owner of a ship who charters her to another tacitly agrees that she is in suitable condition for the use to which she is to be put.
3. If there is a defect in the ship by which she becomes disabled, even though it may not be apparent upon examination, the charterer cannot recover the charter money, and he will be liable for damages occasioned by the defect.

## ADMIRALTY APPEAL.

*Messrs. Thomas Hunton and Given Campbell, for libellant.*

*Messrs. Wm. M. Randolph, Charles B. Singleton and R. H. Browne, for respondent.*

WOODS, Circuit Judge. On the 31st day of March, 1869, respondent chartered the steamer Vicksburg, of which the libellant was the then owner, for the term of two months from that date, at the price of seventeen hundred and fifty dollars per month, and agreed to return her in the same condition in which he received her, and possession was given to respondent of the steamer on the same day. The respondent paid to libellant the agreed price for the first month and \$500 on the price for the second month, leaving a balance of \$1,150.

Before the expiration of the second month of the term of the charter (and it is remarkable that neither the libel, answer nor evidence shows precisely when) the shaft of said steamer broke, and the cylinder head of one of her engines blew out, and her woodwork was thereby somewhat damaged. Thereupon respondent delivered the steamer to libellant and refused to make the repairs necessary to place her in the condition in which he received her, and has not paid the balance of the stipulated price for her use during the second month.

The libellant claims \$1,850, the amount which he says was required to repair his steamer; \$5,000 damages, and \$1,190

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balance of her hire for one month, making in all \$8,040, for which he asks a decree.

The defense is, that the machinery of the Vicksburg was not in perfect order on March 31, the day she was chartered; that her starboard shaft was cracked at that time, although the defect was not apparent; that her boilers were in an unsafe condition, and that she was not seaworthy.

It is clearly established by the proof that the breaking of the shaft and other damage to the steamer occurred when she was running in smooth, deep water, and carrying only one hundred and ten pounds of steam.

The question to be solved by the court is, Was the breaking of the shaft the result of an inherent defect existing at the date of the charter party, or not? If it was, then the libellant is not entitled to recover the balance of money stipulated by the charter party, nor the damage resulting from the breaking of the shaft.

I am satisfied from the evidence that the breaking of the shaft was the result of an inherent defect existing at the time of the charter party. Ordinarily the presumption is in favor of seaworthiness. *Snethen v. The Memphis Ins. Co.*, 3 Ann., 475. But this presumption is completely rebutted where the ship as in this case is shown to be old and approaching the end of her life, as a boat, and when she suddenly fails in a vital part, without any apparent cause. Thus MARSHALL, is decidedly of opinion that "where a ship is lost or is incapable of proceeding on her voyage and this cannot be ascribed to stress of weather or any accident on the voyage, the fair and natural presumption was that she was not seaworthy." Marsh. on Ins., 367.

In the first place it is in evidence that the shaft of the steamer was too small; two shafts of the same diameter had before been broken on this steamer. It is further in evidence that when the shaft snapped asunder, the section thus exposed showed that a part of the fracture was rusty and appeared old, while the rest appeared bright and new. This condition of the fracture cannot be accounted for as is attempted by any strain on the shaft occurring the day before. The appearance

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of the fracture as described by the witness evidently shows that the crack in the shaft was of older date.

We have these facts then. About five or six weeks after the date of the charter party, this ship having a shaft too small for the strain upon it is disabled by the breaking of the shaft in smooth deep water and without any extraordinary circumstances to account for it, and on inspection of the fracture, shows a defect that had existed for some time. I think these facts rebut the presumption of seaworthiness at the time of the charter party.

"It is the duty of the owner of a ship when he charters her or puts her up for freight, to see that she is in a suitable condition to transport her cargo in safety, and he is to keep her in that condition unless prevented by perils of the sea or unavoidable accident. If the goods are lost by reason of any defect in the vessel, whether latent or visible, known or unknown, the owner is answerable to the freighter upon the principle that he tacitly contracts that his vessel shall be fit for the use for which he thus employs her. This principle governs not only in charter parties and in policies of insurance, but is applicable in contracts of affreightment." *Putnam v. Wood*, 3 Mass., 485.

"If there should be a latent defect in the vessel unknown to the owner and undiscoverable upon examination, yet the better opinion is that the owner must answer for the damage occasioned by the defect." 3 Kent, 205, note a; *Lyon v. Mills*, 5 East, 428; *Whitall v. Brig Wm. Henry*, 4 La., 223.

These authorities, in the view I take of the facts, dispose of the libellant's case. He has already been paid for the time his steamer was used by the defendant, and if he has suffered any damage, it was caused by a defect in his vessel, the consequences of which, whether known or unknown, he must bear.

Let the libel be dismissed with costs.

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Rogers vs. The Reliance.

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## ROGERS VS. THE RELIANCE.

The fact that the holder of an admiralty lien has intervened and recovered judgment for the amount of his claim in a state court, in an action *in personam*, the same remaining unsatisfied, is not a bar to a proceeding in admiralty to enforce the lien.

## ADMIRALTY APPEAL.

Mr. R. De Gray, for libellant.

Mr. B. Egan, for claimant.

WOODS, Circuit Judge. The libellant claims the sum of \$107.50, as a balance due him for his wages as engineer upon the steam tug Reliance.

The answer of the claimant sets up, by way of defense, that the libellant had intervened in the case of *Webster Long v. William Taylor*, owner of the steam tug Reliance, in the sixth district court of the parish of Orleans, in which he claimed the same wages that he now claims in this suit; that he obtained judgment therefor, under which the tug was seized and sold, and that afterwards a writ of *fiери facias* was issued on his judgment, by which the wages allowed the said Taylor, by a decree rendered in the United States district court of Louisiana, were seized, and claimant insists that said judgment and proceedings are a bar to a recovery by libellant in this action.

The facts, as developed by the evidence, are not precisely as alleged in the answer. Rogers, the libellant, intervened in the suit in the state court, in which Webster Long was plaintiff, and obtained a judgment *in personam* against Taylor, the defendant. A *fiери facias* was issued, not on the judgment of Rogers, but on the judgment in favor of Long, by virtue of which the steam tug Reliance was seized and sold. No part of the proceeds of the sale was ever applied to the judgment of libellant. Afterwards, Rogers hearing that Taylor had some money in the registry of the United States district court, awarded him as wages in the case of *Patterson and others v. The Steamer Belle Ida*, procured the issue of a *fiери facias* on

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his own judgment, and attempted to levy it on the money of Taylor in the registry of the United States district court. In this design he was frustrated, the district court refusing to allow the money in its registry to be seized on an execution issued from the state court. That execution was therefore returned unsatisfied, and the judgment of the libellant against Taylor *in personam* remains wholly unpaid.

The simple question presented, therefore, is this: Does the fact that the holder of an admiralty lien has recovered judgment for the amount of his claim in a court of law in a suit *in personam* constitute a bar to a proceeding in the admiralty to enforce his lien?

I am clearly of opinion that it does not any more than the recovery of a judgment at law on a note secured by mortgage is a bar to a proceeding in equity to foreclose the mortgage.

The services of the libellant being admitted, and no good reason being shown why his lien therefor should not be enforced against the tug, a decree will be entered in favor of libellant for the amount of his claim, namely, \$107.50, with interest from the 19th day of December, 1871.

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THE UNITED STATES VS. THE C. B. CHURCH.

The penalty for a violation of the 4th section of the act approved Feb. 28, 1871 (16 Stat., 440), which forbids a steamer engaged in carrying passengers from carrying as freight any burning and explosive fluid, cannot be recovered by a proceeding *in rem*. An action of debt against the offending parties is the proper action.

APPEAL from the District Court.

Mr. J. R. Beckwith, U. S. Attorney, for the United States.

Messrs. Given Campbell and Wm. Grant, for claimant.

WOODS, Circuit Judge. This is a libel of information for an alleged violation of the first and fourth sections of the act of congress, approved Feb. 28, 1871 (16 Stat., 440). It is alleged.

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in substance in the first count, that on the 28th day of September, 1871, the said steamer Charles B. Church, being a passenger steamer, and engaged in carrying passengers on the Mississippi river, between Cairo and New Orleans, carried on board, between said points, as freight, fifty barrels of refined petroleum, the same being an explosive and burning fluid.

The second count, which seems to be based on the first section of the act, charges that the "Church" being a vessel propelled by steam, and engaged in carrying passengers between the aforesaid points, was navigated without complying with the terms of the act of congress aforesaid, in this, that she carried as freight between said points fifty barrels of petroleum, the same being an explosive and burning fluid.

The purpose of the libel is to enforce the penalty of five hundred dollars, prescribed by the act of congress for the violation of the sections named.

The claimant excepts to the libel, because the proceeding, being *in rem*, is not authorized by the statute, and the court has no jurisdiction *in rem* against the steamer for the causes alleged in the libel. This exception presents the only question for the decision of the court.

The 4th section of the act of congress referred to provides, among other things, that no refined petroleum shall be carried as freight on any steamer carrying passengers, with an exception not necessary to notice here, but the section does not provide any penalty for the violation of the prohibition.

The 68th section of the act declares that the penalty for the violation of any provision of the act not otherwise specially provided for shall be a fine of five hundred dollars, one-half for the use of the informer.

If these were the only sections to which this libel could be referred, it would be clear that the proceeding *in rem* would not lie. This would not be an admiralty cause, and without express authority an action *in rem* would not lie. Whenever a remedy *in rem* is given in the act, it is expressly provided. See section one. The usual and proper remedy for a penalty is the action of debt.

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Debt lies wherever a sum certain is due the plaintiff, or a sum which can readily be reduced to a certainty; a sum requiring no future valuation to settle its amount. *Stockwell v. United States*, 13 Wall., 542.

When a penalty is given by statute and no remedy for its recovery expressly provided, debt will lie (*Jacob v. United States*, 1 Brock., 520); and when a statute creates a new offense and affixes a pecuniary penalty, appropriating one-half to the informer, it adopts by implication those remedies by which alone the informer can sue. *Rex v. Robinson*, 2 Burr, 803; *U. S. v. Simms*, 1 Cranch, 252.

The 4th and 68th sections have not provided for the collection of the penalty by a proceeding *in rem*, and as they have not expressly provided how the penalty should be enforced, I am of opinion that the action of debt is the proper remedy.

But counsel for the United States claims that the averments of the libel bring it within the provisions of the first section of the act.

This section declares that "no license register or enrollment shall be granted, or other papers issued by any collector or other chief officer of the customs to any vessel propelled in whole or in part by steam, until he shall have satisfactory evidence that all the provisions of this act have been fully complied with; and if any such vessel shall be navigated without complying with the terms of this act, the owner or owners thereof shall forfeit and pay to the United States the sum of five hundred dollars, one-half for the use of the informer, and for which sum the steamboat or vessel so engaged shall be liable, and may be seized and proceeded against by way of libel in any district court of the United States having jurisdiction of the offense."

The 2d, 3d, 7th, 8th, 9th and 10th sections prescribe the equipment and furniture of the steamers referred to in the first section, declaring what pumps, buckets, axes, pipes, hose and life preservers they shall be supplied with, and regulating the stairways, tiller ropes and bell pulls.

Section 4 names the hazardous kinds of freight that shall not

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be carried in such steamers, and it is claimed that the carrying of any of these forbidden articles would be a navigating of the vessel without complying with the terms of the act, and therefore a violation of the first section. But it seems to me this is a strained and unwarranted construction. The first section says that no license shall issue until the collector shall have satisfactory evidence that all the provisions of the act have been complied with, evidently referring to the equipment, etc., of the vessel, and when the section at once proceeds to declare, "and if any such vessel shall be navigated without complying with the terms of this act," the evident meaning is, without being equipped and furnished in such manner as would entitle her to registry and license, and without keeping up such equipment and furniture.

I am satisfied that the punishment for a violation of section 4 is prescribed by section 68 and not section 1, and this opinion is strengthened by section 21, which provides that if the master or owner shall refuse or neglect to comply with the requirements of the local inspectors, or shall contrary thereto employ the vessel by navigating her, etc., the master and owners, and the vessel itself shall be liable to the penalty as prescribed by the first section of the act. If the law maker designed that a violation of section 4 should be punished in the manner provided in section 1, why did he not adopt the language used in section 21? Instead of doing this, no penalty whatever is provided in section 4, and it seems to be left to the operation of section 68.

I am of opinion therefore, that an action *in rem* is not authorized for a violation of section 4 of the act; that the penalty and the mode of enforcing it prescribed by section 1 does not apply to the act, and things made unlawful by section 4; that the penalty for any of the acts forbidden by section 4 is prescribed by section 68, and must be recovered in an action of debt against the *persons* who are guilty. This action *in rem* is therefore misconceived and the libel must be dismissed.

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Otis vs. The Rio Grande.

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## OTIS VS. THE RIO GRANDE.

1. Where a court has jurisdiction of the *res* in a proceeding *in rem*, the record of its decree cannot be collaterally attacked for errors and irregularities appearing therein.
2. When the jurisdiction of a court depends upon a fact which the court is required to ascertain in its decision, such decision is final until reversed in a direct proceeding for that purpose.
3. When at and after the beginning of proceedings in admiralty by the filing of the libel, the court is in actual possession of the *res*, its jurisdiction is not lost by the removal of the *res* from the possession of the court and beyond its territorial jurisdiction, without the consent of the libellant.
4. The United States courts sitting as admiralty courts ought to carry into effect the sentences and decrees not only of other federal courts of admiralty, but also of the admiralty courts of foreign countries.

This was an admiralty appeal. The suit is founded upon a record of the United States circuit court for the southern district of Alabama.

*Messrs. T. J. Semmes and Robert Mott*, for libellants.

*Messrs. Arthur Saucier and F. Mechenard*, for claimant.

WOODS, Circuit Judge. The facts are these: The libellants in this case brought an action in the district court for the southern district of Alabama, on the 22d of November, 1867, against the steamer Rio Grande, to enforce what they claimed was an admiralty lien for labor and materials furnished in repairing said steamer in the port of Mobile. The steamer was seized and held by the marshal of the southern district of Alabama. On the 11th day of May, 1868, the district court in which the case was pending, dismissed the libel. On the next day the claimants moved the court for an order that the marshal deliver the steamer to Wm. Stewart and Wm. Ross, which was granted. On the 14th day of May, written notice of a demand for appeal to the circuit court for southern Alabama was filed in the office of the clerk of said district court, and on the same day an appeal bond duly approved was filed by the libellants with the clerk of the district court.

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**Otis vs. The Rio Grande.**

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Notwithstanding the appeal, the marshal delivered the steamer to Steward and Ross.

Afterwards, in June, 1869, Thomas McClellan, of the city of New Orleans, being in the city of Mobile, purchased the Rio Grande of James N. Williams and Mary Ann Price, who then claimed to be her owners, and afterwards sold her to the claimant in this case by a bill of sale, which only conveyed the interest acquired in the steamer by McClellan, by virtue of the bills of sale of Williams and Mrs. Price.

In the meantime the case was carried by the appeal from the district to the circuit court for the southern district of Alabama, in which last named court, on the 11th day of January, 1871, a decree was rendered in favor of the libellants in this case for \$1,508, and costs; the lien of the libellants for that amount upon the Rio Grande was recognized, and she was condemned for the payment thereof.

To enforce this decree of the circuit court for the southern district of Alabama is the purpose of this suit, and the libel is founded on the record of the decree of the circuit court for Southern Alabama.

The only defenses that can be made against the enforcement of this decree are, either that the decree has been paid, or that it is absolutely void.

The defense set up by claimant is that the decree of the circuit court condemning the Rio Grande is void.

Counsel for claimant call attention to what they suppose to be the irregularities and errors of the proceedings in the circuit court.

Admitting such irregularities and errors to exist, it by no means follows that the decree is void. This court has no jurisdiction to decide upon the errors and irregularities of the circuit court of Southern Alabama, if that court had jurisdiction to make the decree which it made. The errors of that court can only be corrected by the supreme court of the United States.

“When a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its de-

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cision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court." *Elliott v. Peirsol*, 1 Peters, 340. }

Thus the circuit court in Alabama had jurisdiction to decide whether an appeal had been properly taken and prosecuted to itself from the district court. It did pass upon that question in the case of *Otis v. The Rio Grande*, and that decision is binding upon this and every other court, until reversed in a direct proceeding.

So in *Cooper v. Reynolds*, 10 Wall., 308, it is laid down as an axiom of law, "that when a judgment of a court is offered collaterally in another suit, its validity cannot be questioned for errors which do not affect the jurisdiction of the court that rendered it."

We can therefore pass over all the irregularities and errors not affecting the jurisdiction of the court which counsel for claimants allege to exist in the record of the circuit court of Alabama, on which this suit is based, and we are authorized to inquire only whether that court had jurisdiction to render the decree set out in the record.

The jurisdiction of that court is attacked on two grounds:

1. Because the claims of libellant were for supplies and materials furnished the Rio Grande in her home port, and therefore no admiralty lien existed which that court had jurisdiction to enforce; and,

2. Because pending the case in district and circuit courts for the southern district of Alabama, the *res* against which the action was brought was removed from the possession and from the territorial jurisdiction of the court, and therefore the circuit court in the absence of *res* had no power to decree against it.

Touching the first ground, it is sufficient to say that one of the issues in the case before the circuit court of Alabama was, whether or not the Rio Grande was a foreign or domestic vessel. It was clearly within the jurisdiction of the court to decide that question, and having decided it, its decision is conclusive until reversed in a direct proceeding.

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Otis vs. The Rio Grande.

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"When the jurisdiction of a tribunal depends upon a fact which such tribunal is required to ascertain and determine by its decision, such decision is final until reversed in a direct proceeding for that purpose."

"The test of jurisdiction in such cases is whether the tribunal have power to enter upon the inquiry, and not whether its conclusions in the course of it were right or wrong." *Colton v. Beardsley*, 38 Barb., 30.

The Alabama court having decided the jurisdictional fact that the Rio Grande was a foreign vessel, it would ill become this court to hold its decree to be absolutely void because it should be of opinion that that court erred in its conclusions upon that issue.

A more serious question however is raised by the second objection to the jurisdiction of the Alabama court, namely, that the court lost jurisdiction by losing possession of the steamer Rio Grande.

The general rule is well settled that the jurisdiction of courts of admiralty in cases of proceedings in *rem* is founded on the actual or constructive possession of the *res*.

But the precise point presented in this case is this: When at and after the commencement of the proceedings by the filing of the libel, the court is in the actual possession of the *res*, is its jurisdiction lost by the removal of the *res* from the possession of the court and from its territorial jurisdiction without the consent of the libellant?

This question was passed upon by Mr. Chief Justice MARSHALL in the case of *The U. S. v. Schooner Little Charles*, 1 Brockenbrough's Reports, 355. The Chief Justice says:

"That the possession of the thing is necessary as a foundation for the jurisdiction of the court is, in general, true. There must be seizure to vest jurisdiction, but it is not believed that the continuance of possession is necessary to continue the jurisdiction. It is a general principle that jurisdiction once vested is not divested, although a state of things should arrive in which original jurisdiction could not be exercised. No authority has been found nor is any reason perceived for making this

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case an exception to the general rule." See also *Wilson v. Graham*, 4 Wash. C. C. Rep., 53.

Following the authorities cited, I am of opinion that the removal of the Rio Grande from the control and jurisdiction of the court did not oust the jurisdiction of the court, and as a consequence, that the decree of the circuit court for the southern district of Alabama is valid and binding.

This court is in duty bound to carry into effect the sentences and decrees, not only of other federal courts, but even of the admiralty courts of foreign countries (*Jarado v. Gregory*, 1 Vent., 32; 2 Sir Leo Jenkins, 714), and must give a decree in favor of libellants unless one other defense relied on by claimant should prove to be well founded.

This is, that from the very circumstances of the case, respondents could have nothing to urge against the libel in the district court, their ownership of the Rio Grande having accrued long after the proceedings in said court had terminated, to wit: in September, 1869.

But their claim to ownership arose before the decree in the circuit court. They and all other persons interested were parties, and had the right to be heard in that court, and would have been heard upon proper application. As to the "thing" which was defendant in that suit, all persons claiming it on the ground of property or possession were represented by it in that court, although they were not served with process, or had not heard of the proceedings. The *lis pendens* was notice to all the world. *Wilson v. Graham, supra*.

Believing the decree of the circuit court of Alabama to be a valid and binding decree until reversed in a direct proceeding, and that it is the duty of this court when called on to enforce it, and no sufficient reason appearing to the contrary, decree must be rendered in favor of the libellants against the steamer Rio Grande, for the amount of their several claims, with interest and costs and for the costs in the district and circuit courts of the southern district of Alabama.

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**Dowling vs. The Reliance.**

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**DOWLING VS. THE RELIANCE.**

**A person who makes a parol contract for the purchase of a share in a vessel, and receives, jointly with the other owners, possession of the vessel, cannot acquire a lien upon her for maritime services.**

**ADMIRALTY APPEAL.**

*Mr. T. M. Gill*, for intervenor.

*Mr. B. Egan*, for complainant.

WOODS, Circuit Judge. W. H. Riddle, who intervenes in the suit of Dowling against the steam tug *Reliance*, claims to recover of the tug the sum of \$290, being the remainder of his wages, due for his services as pilot from September 1, 1871, to December 8 of the same year, at the rate of \$150 per month.

The answer does not deny the services of the intervener, but alleges that he was not shipped or hired as pilot, but that he rendered the services sued for, as master, and under the express understanding and agreement that he should become a part owner of the tug.

The evidence is somewhat conflicting as to the precise character in which the intervener served on the tug, whether as pilot or master. But as to the contract or agreement that intervener was to become a part owner, the record clearly establishes these facts:

That prior to the date when intervener commenced his services on the tug, to-wit, in August, 1871, she was the property of William Taylor; that Taylor made a verbal agreement with the intervener, Riddle, and one Chapman, by which he sold to them each one-third of the tug, retaining the other third himself. No bill of sale was ever executed conveying to these purchasers their respective shares, but an account was opened with each in a book kept on board the tug, and open to their inspection, and which, it is clear from the evidence, they must have seen, in which each was charged with the purchase money of his share of the tug, namely, \$2,000. There can be no doubt that Taylor in this manner sold to Riddle and Chapman

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Dowling vs. The Reliance.

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each one-third of the tug, and the purpose and hope of these joint owners was that by putting the tug in good repair, and all three devoting their time and labor to the task of running her, they would be able not only to pay off the claims then outstanding against the tug, but that Riddle and Chapman, out of their portion of the profits of the business, would be able to pay the purchase money for their shares respectively. It is further established by the proof, that during all the time of the service of Riddle upon the tug, she stood registered in the name of Taylor as sole owner.

Was this sale by parol of a third interest in the tug to Riddle, effectual to pass to him any interest in the tug as owner?

Mr. Chancellor KENT in his Commentaries (3 Kent, 130, 131) says: "A bill of sale is the true and proper muniment of title to a ship, and one which the maritime courts of all nations will look for, and in their ordinary practice require. Possession of a ship and acts of ownership will, in this as in other cases of property, be presumptive evidence of title without the aid of documentary proof, and will stand good until that presumption be destroyed by contrary proof, and a sale and delivery of a ship without any bill of sale, writing or instrument, will be good at law between the parties."

So Mr. Greenleaf, in his work on evidence (1 Greenl. Ev., sec. 261), observes: "By the statutes of the United States and of Great Britain, the grand bill of sale is made essential to the complete transfer of any ship or vessel through or between the parties themselves; a title may be acquired by the vendee without such document."

On the other hand, it is said by Mr. Justice STORY, in the case of *Ohl v. Eagle Insurance Company*, 4 Mason, 172, "I think that a title to a ship cannot pass by parol when she is sold to a purchaser."

Even conceding that the weight of authority is with Mr. Justice STORY, yet I think it clear, that when a parol contract of sale is made and is followed by a possession of the ship, the purchaser cannot acquire a lien on the ship for maritime services. The fact that he has an equitable ownership in the

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**Deshon vs. Fosdick & Co.**

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vessel is conclusive evidence that he does not render the services on the credit of the vessel, but they are rendered to himself as part owner. The evidence in this case makes it clear that Riddle rendered service to the tug, supposing himself to be one of her owners, and in fact having an equitable title to a third interest in her; and that as soon as he completed the payment of the purchase price, that interest would have been conveyed to him by Taylor, in whom the paper title to the tug remained.

Under these circumstances, I am of opinion that Riddle has no lien upon the tug for his services, and that his intervention must be dismissed at his costs.

Decree accordingly.

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**DESHON VS. FOSDICK & Co.**

1. Where parties are in treaty by letter and telegraph to make a contract, there must be a distinct offer on one hand and an acceptance of it on the other, showing a concurrence of the minds of the parties upon all the terms of the contract before either party is bound.
2. A., in Boston, was in correspondence with B., in New Orleans, in reference to the chartering of a ship to B. to carry freights from New Orleans to Europe, and represented that the ship would sail from Boston for New Orleans on a day certain. *Held*, that the representation amounted to a warranty that the ship should sail on that day. The ship did not sail for two days after the time fixed; therefore, B. was not bound.

Jury waived and cause submitted to court on facts and law.  
*Mr. Thomas Hunton*, for plaintiff.

*Messrs. L. Madison Day and J. R. Beckwith*, for defendant.

WOODS, Circuit Judge. The petition alleges, that on March 10, 1871, the ship *E. Sherman*, then lying in the port of Boston, was chartered by plaintiffs, who were the owners, to defendants for the purpose of transporting cotton from the port of New Orleans to some European port, at a rate of freight agreed

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Deshon vs. Fosdick & Co.

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upon. That in pursuance of the contract, the ship sailed for New Orleans, and arrived on the 12th day of April. That on her arrival she was accepted by the defendants, but on April 19, they repudiated the contract and declared they would not accept, and would not receive the ship. The plaintiffs aver, that by reason of the premises, they have been damaged in the sum of \$6,798.73, with interest, from judicial demand, for which they ask judgment.

The defendants plead :

1. A general denial.

2. That they did by letter and telegrams agree to charter said ship on the understanding and representation that she would sail from Boston on Wednesday the 8th day of March, 1871, but that she did not sail for several days after that time and that as soon as defendants were advised of that fact they gave notice to plaintiff, Wm. Deshon, who was master of said ship before she was tendered to them under said charter party, that they were not bound to take her under said charter party, and no tender was thereafter made to defendants.

The evidence in the case establishes these facts :

On the 9th of March, 1871, the defendants telegraphed from New Orleans to Howes, Ryder & Co., in Boston, the agents of plaintiffs, as follows :

“Shall we close Sherman; Liverpool; three farthings; Havre, 1 1-2, Continent, 13-16.”

On the 10th of March the foregoing dispatch was answered by Howes, Ryder & Co., as follows: “Close Sherman, three farthings Liverpool; 13-16, Continent; full cargo.”

On March 10th, after the receipt by defendants of this dispatch and before it was answered by them, defendants received a letter written by Howes, Ryder & Co., on the 6th of March, in which they say “Our ship *E. Sherman* will sail on Wednesday for your port. We have given our captain letters of introduction to your house, and if he is not chartered before he arrives, hope you will look after him immediately and offer him some good business. He has given me authority to close him at three quarters Liverpool. At any time you can offer

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her that before he arrives, please let us hear from you and we hold the opportunity to accept the first offer made at those rates from any house," etc.

After the receipt of this letter and of the telegram of Howes, Ryder & Co., of the 10th of March above given, and on the evening of that day the defendants sent the following telegram to Howes, Ryder & Co. : "Sherman closed. Liverpool, three farthings; Havre, one and a half, or Continent, thirteen sixteenths.

It is further shown by the testimony of the defendant Fosdick that had he not received on the 10th the letter of Howes, Ryder & Co., advising him that the *Sherman* would sail for Boston on 8th of March he would not have sent his telegram of that date closing the contract chartering the ship.

The pleadings and evidence present two questions for decision.

The first is, Did the telegram of defendants of the 9th of March and the reply thereto of Howes, Ryder & Co., of the 10th, complete and conclude the contract of the parties? A negative answer must be given to this question. The telegram of the 9th was an inquiry to which the telegram of the 10th was an answer. It meant simply, Will you charter your vessel on the terms named? The answer is in effect an affirmative reply. This does not make a contract until the defendants have sent another dispatch accepting that ship on the terms specified.

But it is to be observed that the terms in the answer of Howes, Ryder & Co., do not correspond with the inquiry propounded in the telegram of defendants. They inquire, "Shall we close *Sherman*, Liverpool, three farthings; Havre, one and a half; Continent, thirteen-sixteenths?"

In the answer of Howes, Ryder & Co., nothing is said about the rates to Havre, and the words "full cargo" are added. So that by the passage of these two telegrams the minds of the parties had not concurred upon the terms of the contract.

A second despatch from defendants was necessary to complete the contract, and this was sent on the night of March 10,

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after the reception by defendants of the letter of Howes, Ryder & Co., dated March 6.

Other questions to be determined are, Did the statement, made in the letter of the 6th, that the Sherman would sail on the 8th, form a part of the contract? and, if it did, was it a mere representation, or was it a condition precedent?

I can see no reason why the element by which the date of the sailing of the ship was fixed should be excluded from the contract any more than the rates of freight. Howes, Ryder & Co. were corresponding with defendants, both by letter and telegram, in reference to the chartering of the ship. Before defendants finally closed the contract, they had before them the telegram of Howes, Ryder & Co., fixing the rates of freight, and their letter naming the day when the ship would sail from Boston. It is fair to presume that both operated on the mind of defendants in inducing them to charter the ship, and the express testimony is, that such was the fact. We may then conclude that the sailing of the ship on the 8th of March was a part of the contract.

But was it a condition precedent? Did it amount to a warranty that the ship should sail on the day named?

This question appears to be settled by the case of *Lowber v. Bangs*, 2 Wallace, 728, and the cases cited in the opinion of the court. In that case it was held, "that a stipulation in a charter party that the chartered vessel, then in distant seas, should proceed from one port named to another port named with all possible despatch, is a warranty that she will so proceed, and goes to the root of the contract; it is not a representation simply that she will so proceed, but a condition precedent to the right of recovery."

In *Glaholm v. Hays*, 2 Manning & Granger, 257, cited by counsel, and referred to by the court in *Lowber v. Bangs*, the language of the charter party was, "the vessel to sail from England on or before the 4th of February next," and this was held to be a condition precedent. In *Ollive v. Booker*, 1 Exchequer, 416, the vessel was described as "now at sea, having sailed three weeks ago," and it was held that the time at which

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the vessel sailed was material, and the statement in the charter party amounted to a warranty. See, also, *Oliver v. Fielden*, 4 Exchequer, 135; *Crookewit v. Fletcher*, 1 Hurlstone & Norman, 912; *Behn v. Burness*, 8 Law Times, 207, April, 1863.

Holding, therefore, that the statement made by Howes, Ryder & Co., the agents of the owners, in their letter of March 6, that the Sherman would sail on the 8th, entered into the contract of the parties and amounted to a warranty, and there being no dispute of the fact that she did not sail until the 10th, I am of opinion that plaintiff has shown no case for a recovery, and that there must be a finding and judgment for costs in favor of defendants.

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NOVEMBER TERM, 1873.

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## SMITH VS. THE ROYAL GEORGE.

1. A ship carpenter who deposits, for safe keeping, money and other valuables with the captain of a steamboat on which he is employed, has no lien upon the boat therefor.
2. The owner of an old and decayed boat employed libellant, who was a ship carpenter, to assist in building for him the hull of a new boat, and after it was completed, dismantled the old boat and used some of its materials in fitting up the new one: *Held*, that libellant had no lien on the new boat for his wages.

## ADMIRALTY APPEAL.

*Mr. R. De Gray*, for libellant.

*Mr. F. W. Huntington*, for respondent.

WOODS, Circuit Judge. The libel alleges in substance that on September 15, 1870, at Shreveport, Louisiana, the libellant was hired to go to Hind's Landing, Arkansas, on Little river, to assist in building a new hull for the steamboat Royal George,

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and when completed, to run on her as carpenter at the rate of \$150 per month. That he was engaged in work upon said hull for the period of eight months, and until about the 13th day of May, 1872, about which latter date the Royal George left Hind's Landing for Shreveport, Louisiana, with the libellant on board in the capacity of carpenter, and while making said voyage, libellant was driven off the boat by the officers without payment of his wages.

That when he went to work at Hind's Landing he deposited with James Crooks, the captain and owner of said steamboat, \$350 in cash, and his watch worth \$80. That Crooks refused to return him his money and watch, and also detained and refused to deliver the libellant's clothing of the value of \$100, and his tools, also of the value of \$100.

The libel asks a decree for \$1,200 for wages, and for \$630; that sum being equal to the value of his clothing, tools and watch, and the money deposited with the captain and owner.

The claimant, James Crooks, filed an exception to the libel, alleging that the court had no jurisdiction of the matters set out in the libel, the same not being matter of admiralty and maritime jurisdiction.

By consent of both parties, this exception was set down for hearing when the case should come up for trial upon its merits.

The answer of Crooks, claimant, admits that there is due the libellant on account of his wages, the sum of \$560.69, which it avers has been tendered to him and refused. It admits the deposit of the \$350, which claimant says he is ready to pay over on demand, but denies that he ever had possession of the clothes, watch or tools of libellant, and denies that libellant was ever driven from the Royal George by her officers, and avers that he left the boat of his own free will.

The district court dismissed, for want of jurisdiction, the claim of libellant for money deposited, and for the value of his clothing and tools, alleged to be detained by claimant, and rendered a decree for wages for the sum of \$901, with interest from date of judicial demand.

It is conceded by the claimant's counsel that the decree for

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wages is for the correct amount, but he denies the jurisdiction of the court to render such a decree upon the facts of the case as presented by the evidence.

The proof does not sustain, in all respects, the case as made by the libel.

The proof shows that libellant was employed by James Crooks, who was the master and owner of a steamer named The George, to go from Shreveport, in Louisiana, to Hind's Landing on White river in Arkansas, and there build the hull of a boat. That libellant went to said landing and worked, getting out timber and building a new hull. That when the hull was completed, the boilers of the George were put into it, her pilot house and roof were removed to and put up on the new hull. A new steamboat was thus completed, some of the materials of the George being used in the construction of the new boat. The new boat was called The Royal George, and was owned by Crooks, who was also her master. There is no evidence that libellant was shipped on the Royal George as carpenter, nor that he ever did any work on her as carpenter after she left the landing where she was constructed.

The claimant insists that the facts do not show a maritime contract. The point is, Does a contract made with a shipwright to assist in the building of a new boat, on which some of the materials from an old dismantled boat are to be used, fall within the maritime law and give the laborer a lien upon the boat for his wages?

The admiralty jurisdiction in cases of contract depends primarily upon the nature of the contract, and is limited to contracts, claims and services purely maritime, and touching rights and duties appertaining to commerce and navigation. 1 Conkling M. L., 19.

In the case of *The Peoples' Ferry v. Beers*, 20 How., 393, the libel was filed by the builders against a new steam ferry boat for a balance due the builders on account of work done and materials employed in constructing the hull of the vessel. In passing upon this case the supreme court say: "The only matter in controversy is, whether the district courts of the United States

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have jurisdiction to proceed in admiralty to enforce liens for labor and materials furnished in constructing vessels to be employed in the navigation of waters to which the admiralty jurisdiction extends. The contract is simply for building the hull of a ship and delivering it upon the water. The vessel was constructed and delivered according to the contract, and was in the possession of the party for whom it was built when the libel was filed.

“It must be borne in mind that liens on vessels encumber commerce and are discouraged, so that when the owner is present no lien is acquired by the material man, nor is any when the vessel is supplied or repaired in the home port. The lien attaches to foreign ships and vessels only in favor of the carpenter who repairs in a case of necessity and in the absence of the owner. It would be a strange doctrine to hold the ship bound in a case where the owner made the contract in writing, charging himself to pay by installments for building the vessel at a time when she was neither registered nor licensed as a sea going ship. So far from the contract being purely maritime, and touching rights and duties appertaining to navigation on the ocean or elsewhere, it was a contract made on land, to be performed on land.”

So in *Roach v. Chapman*, 22 Howard, 129, the supreme court held that a contract for building a ship or supplying engines, timber or other materials for her construction, is clearly not a maritime contract. Any former *dicta* or decision which seemed to favor a contrary doctrine were overruled by this court in the case of the *People's Ferry Co. v. Beers*, 20 How., 893.

In *Collis v. Coevnine*, decided by Judge BETTS and reported in vol. 7, Am. Law Register, 5, it was held that a contract made in a port of the United States to construct a vessel in a port of another state by actually building her, or by supplying materials for such construction, is not a maritime contract, creating a lien upon the vessel for the value of the materials, supplies or labor, which is enforceable in admiralty.

These decisions seem to establish very clearly that the claim of libellant in this case for work done is not a lien upon the steamboat.

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It is claimed, however, by libellant, that the rule laid down in *Roach v. Chapman, supra*, has since been modified, and we were cited in support of this view to the case of *The Grapeshot*, 9 Wallace, 129.

Neither the case of *The Grapeshot*, nor any other case to which we have been cited, changes the law laid down in *Roach v. Chapman*, to the effect that a contract for labor or materials to build a vessel is not a maritime contract, and that neither the shipwright or material man has a lien therefor on the vessel. I am of opinion, therefore, that this court has no jurisdiction to render a decree for the wages due libellant. That we have no jurisdiction to render a decree for the money deposited, and for the value of the watch, clothing, and tools of libellant, is too clear to need argument.

The libel must be dismissed at the costs of libellant.

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THE UNITED STATES VS. BEJANDIO.

An indictment based on the 21st section of the act approved March 8, 1835 (4 Stat., 121), which names the person whom the accused intended to defraud by the passing of the counterfeit coin, need not also name the person to whom the coin was passed.

This case was heard upon a motion to quash the indictment. *Mr. J. R. Beckwith*, U. S. Attorney, for the United States. *Mr. Charles Case*, for defendant.

WOODS, Circuit Judge. This is an indictment for passing and uttering as true a forged and counterfeit coin in the resemblance and similitude of the coin of the United States, composed of copper and nickel and known as five-cent pieces. The indictment is based on the 1st and 2d sections of the act of May 16th, 1866, entitled "an act to authorize the coinage of

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five cent pieces" (14 Stat., 47), and the 21st section of the act of March 3d, 1825, entitled "an act more effectually to provide for the punishment of certain coiners against the United States, and for other purposes" (4 Stat., 121).

The substance of these sections so far as they apply to this indictment is, that if any person shall forge or counterfeit a five cent piece, composed of copper and nickel, or shall pass any such forged or counterfeited coin with intent to defraud any body politic or corporate, or any other person or persons whatever, he shall be deemed guilty of a felony, etc.

The indictment contains three counts, one of which charges the defendant with uttering and passing, etc., with intent to defraud one Robert Harris, and the other two with uttering and passing, etc., with intent to defraud some person or persons to the grand jury unknown.

Neither count of the indictment contains any averment of the name of the person to whom the counterfeit coin was passed.

The defendant moves to quash the several counts of the indictment as insufficient for want of such averment, and to sustain his motion cites the following authorities: 2 Bish. Crim. Pro., sec. 258, note 2, and sec. 425; 1 id., secs. 522 and 559, note 5; and 3 Greenl.'s Ev., sec. 22.

The English precedents of indictments for uttering forged coin, to be found in 2 Chitty's Crim. Law, 112, 113 and 114, all aver the name of the person to whom the forged coin was passed.

These authorities, it must be observed, all apply to statutes that do not contain the clause to be found in the law upon which this indictment is founded, namely: "with intent to defraud any person whomsoever."

Thus the act of 15 Geo. II, ch. 28, sec. 2, provides that "if any person shall utter or tender in payment any false or counterfeit money, knowing the same to be so, he shall suffer six months imprisonment," etc.

The object of the rule requiring under such a statute, the name of the person to be stated to whom the forged coin was

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**Cotton Press Company vs. The Collector.**

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passed, was to describe the offense and give the accused notice of the charge he would be called on to meet.

I think the averment that the forged coin was passed with intent to defraud some person or persons, which is required to be made in an indictment under the United States statute, is a substitute for an averment specifying the name of the person to whom the coin was passed. It seems to define the offense and to give notice to defendant of the accusation against him. To require both averments to be made, as that the coin was passed to A. B. to defraud A. B., or was passed to A. B. to defraud C. D., is requiring too great particularity.

This view is sustained by the form of indictments to be found in Wharton's Precedents, volume 1, 338, 339, 340, which we are informed by a note have been sustained in the United States circuit courts sitting in New York and Philadelphia.

The like forms are also given in Abbott's U. S. Practice, vol. 2, 465. I am disposed to follow these precedents.

I think the indictment is a sufficient notice to the defendant of the accusation against him, and defines with sufficient particularity the offense with which he stands charged, that after he is charged with passing a counterfeit coin to defraud A., it would be a matter of form to aver further that he passed the coin to A. or to B., the omission of which could not tend to the prejudice of the defendant.

Therefore, even if the omission complained of was a defect in the indictment, it would be cured by the 8th section of the act of June 1, 1872, entitled "an act to further the administration of justice." (17 Stat., 198.)

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**COTTON PRESS COMPANY VS. THE COLLECTOR.**

1. An incorporated company, whose business is to make gain by compressing cotton, is not required to pay a tax on its dividends by sec. 120 of the act of June 30, 1864. (18 Stat., 288.)
2. An appeal to the commissioner of internal revenue, for the refunding

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of a tax illegally collected by the collector of internal revenue, dates from the time the application to have the tax refunded is filed in the office of the commissioner, and not from the time it is lodged with the collector of internal revenue.

This was an action at law against the collector of internal revenue to recover a tax illegally collected.

*Messrs. Charles Case and J. D. Rouse*, for plaintiff.

*Mr. J. R. Beckwith*, U. S. Attorney, for defendant.

WOODS, Circuit Judge. The parties have waived the intervention of a jury, and submitted the case upon an agreed statement of facts.

The action is brought to recover of defendant the sum of eight hundred and twenty-five dollars, which the plaintiff avers was illegally collected from it by the defendant, acting as collector of internal revenue, as a tax upon a dividend declared to its stockholders by plaintiff.

The facts are, that on the 25th of August, 1869, the tax having been regularly assessed, was paid to defendant under the threat that, if not paid, he would seize and sell the plaintiff's property to make the tax.

The plaintiff appealed, according to law and the treasury regulations, to the commissioner of internal revenue, and demanded the refunding and return of the said sum of eight hundred and twenty-five dollars.

The appeal and application for refund were executed, dated and deposited with the defendant on November 30, 1869, and on that day certified by him in his official capacity and forwarded by mail to the commissioner of internal revenue, by whom it was received and filed in his office on a day subsequent to the 4th of December, 1869. The appeal has not been acted upon or decided.

This action was commenced December 3, 1869.

The plaintiff seeks to recover back the money on the ground that no tax upon its dividends was imposed by any law of the United States.

The defendant pleads that the tax was authorized by law,

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and that the action to recover it back was not brought until after the expiration of one year from the taking of the appeal, and that it is therefore barred.

The law under which it is claimed that the tax was imposed on the dividends of the plaintiff is the 120th section of the act of June 30, 1864 (13 Stat., 283), entitled an "act to provide ways and means for the support of the government and for other purposes." This section provides that there shall be levied and collected a duty of five per centum on all dividends declared "as part of the earnings, income or gain of any bank, trust company, savings institution and of any fire, marine, life, inland insurance company, either stock or mutual, under whatever name or style known or called in the United States or territories."

The "Levee Steam Press Cotton Company" is not a bank, is not a trust company, is not a savings institution, is not a fire, marine, life or inland insurance company. It is an incorporated body whose business is to make gains by compressing cotton. By what construction it was supposed to fall among the companies enumerated in the section cited it is difficult to imagine. The language of the section makes it clear, no argument can make it clearer, that such companies as the plaintiff are not included in its terms. The tax collected by Stockdale was therefore not authorized by law, and the plaintiff has the right to recover it back, unless his claim is barred by the limitation of the statute.

The limitation is prescribed by the 19th section of the act, approved July 13, 1866 (14 Stat., 152), which declares that "no suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected until appeal shall have been duly made to the commissioner of internal revenue, according to the provisions of law in that regard and the regulations of the secretary of the treasury established in pursuance thereof, and a decision of such commissioner be had thereon, unless such suit shall be brought within six months from the time of said decision, or within six months from the time this act takes effect: provided

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that if said decision shall be delayed more than six months from the date of said appeal, then said suit may be brought at any time within twelve months from the date of such appeal."

It is conceded in this case that the decision was delayed more than six months. The limitation was therefore twelve months from the date of the appeal. This branch of the case then turns on the question, when was the appeal taken? If it was taken when the application for refund was executed, dated and deposited with Stockdale, the defendant, and certified by him, then the suit was not brought within one year from the date of the appeal. But if the appeal was made when the application for refund reached the commissioner of internal revenue, and was filed in his office, then the suit was brought within one year from the time of the appeal, and is not barred.

Upon this point there can be no serious question, it seems to me. The appeal is to be made to the commissioner of internal revenue, and not to the collector. It is the commissioner who is to examine the application and pass upon it. It would seem, therefore, that when the application is brought to his notice, or filed in his office, and not till then, the appeal is taken. The papers are lodged with the collector, not for his decision, but that he may certify to the date of payment of the amount claimed, and that the claim has not been before presented. No appeal will lie until the application has his certificate. The application is not lodged with him as an appeal, but that he may perfect the papers by his certificate so that the appeal may be made to the commissioner. If the papers never go beyond the office of the collector there is no appeal. The appeal, therefore, should take date from the time of its filing in the office of the commissioner of internal revenue, who alone can act on it.

I am of opinion, therefore, that the appeal in this case was not taken till after December 4, 1869. The suit was commenced on the 3d day of December, 1870. It is therefore within the year and not barred.

The result is, that there should be a judgment for plaintiff

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**Savin vs. The Juno.**

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for eight hundred and twenty-five dollars, the amount of the illegal tax collected, with interest from August 25, 1869, the date of its payment.

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**SAVIN VS. THE JUNO.**

A mariner having repeatedly asked for his wages without receiving them, and being in a strange land and in great need of money, agreed to take one-third the amount due him in full payment, and release the ship and owners, and on payment of one-third the amount due signed a receipt in full; *held*, that the agreement to take less than the whole amount due was *nudum pactum* and the receipt no bar to a recovery for the balance due.

**ADMIRALTY APPEAL.**

*Mr. E. N. Whittemore*, for libellant.

*Mr. Jos. P. Horner*, for claimant.

WOODS, Circuit Judge. This is a case in admiralty, appealed from the district court.

The libellant claims the sum of eighty-eight dollars and twenty-five cents, as the balance due him on his wages as cook and steward of the ship Juno, for services rendered as such from the first of August, 1872, until the 14th of January, 1873.

The defense which is set up by way of peremptory exception is, that on the 24th of January, 1873, the libellant in consideration of the sum of \$55, released the Juno, her captain and owners from the claim set forth in the libel.

The facts as shown by the proof are, that the ship was indebted to the libellant in the sum of one hundred and thirteen dollars and sixty-eight cents. Instead of paying him the amount, the captain paid him one-third of the amount and took his receipt in full for the \$113.68. The libellant understood the purport of the receipt when he signed it, and agreed to take one-third the amount due him in full payment, but he had repeatedly tried to get his pay from the captain without success,

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Brown vs. The Bradish Johnson.

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and was in a strange place and at the time he signed the receipt, in great need of money.

The question is, Does the receipt bar him from the recovery of the money which it is admitted was due him and has not been paid? I am clearly of the opinion that it does not. By the common law an agreement not under seal to take a sum less than was due in satisfaction, was *nudum pactum*, and could not be enforced.

In the admiralty an acquittance and release, under seal even, executed by a seaman on the payment of his wages does not operate as an estoppel, but is treated as a common receipt. It is *prima facie* but not conclusive proof of payment. *The David Pratt*, Ware's Reports, 509; *Harden v. Gordon*, 2 Mason, 541; *Thomas v. Lane*, 2 Sumner, 11.

The question is, What is due the libellant? Only one-third of his wages has been paid him. His agreement to take less is *nudum pactum*. The taking of a receipt in full from him does not pay the other two-thirds, nor does the receipt constitute a contract binding upon him not to demand the balance due him, and is no bar to a recovery.

Let there be a decree for the libellant for \$79.12, the residue of his wages which it is conceded was not paid, with interest from January 24, 1873, the day when it was due, and costs, in the district and circuit courts.

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BROWN VS. THE BRADISH JOHNSON.

A mariner who is injured in the service of the ship is entitled to be cured at the expense of the ship although no one is in fault, but he cannot recover damages in the nature of extra wages unless there has been some carelessness or other fault on the part of the officers of the ship.

ADMIRALTY APPEAL.

Mr. Richard De Gray, for libellant.

Mr. B. Egan, for claimant.

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**Taylor and others vs. Steamer Marcella.**

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WOODS, Circuit Judge. This libel is brought to recover damages in the nature of extra wages for an injury received by the libellant while in the service of the steamer through the carelessness of the master.

After a careful reading of the evidence in this case, I cannot see that there was any carelessness on the part of the master of the steamer. The libellant was hurt by an accident liable to happen to him without the fault of any one. This is one of the risks of his occupation for which he is paid. If injured while in the service of the vessel and in the discharge of his duty, he is entitled to be cured at the expense of the ship, even where no fault is to be attributed to any one. *Harden v. Gordon*, 2 Mason, 541; *Reed v. Canfield*, 1 Sum., 195. But he cannot recover damages unless there has been some fault on the part of the officer of the boat.

As this suit is for damages and no fault is shown, the libellant's case is not made out.

The libel is therefore dismissed at libellant's costs.

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**TAYLOR and others vs. STEAMER MARCELLA.**

The owners of a steamer entered into a contract for the carriage of 70,000 staves, in which was this stipulation: "we agree to forfeit \$1,000 if we fail to carry out this contract." The contract was partly performed by the carriage of 57,000 staves, and the part performance accepted. *Held*, that the contract provided for a penalty to cover actual damages, and did not provide for liquidated damages, and as no actual damage was shown, none was allowed.

**ADMIRALTY APPEAL**

*Messrs. R. De Gray and B. Egan*, for libellants.

*Mr. G. L. Bright*, for Avendano & Bros., claimants.

WOODS, Circuit Judge. This is a libel brought by certain mariners for their wages, against the steamer Marcella, and

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Taylor and others vs. Steamer Marcella.

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against the freight earned by her on 57,000 staves. Avendano & Bros., the owners of the staves have been made defendants, and to the claim of libellants, answer in substance: that on the 16th of April, 1863, they made an agreement in writing with the owners of the Marcella, whereby the latter contracted to transport on board the Marcella, from Richland parish to New Orleans, 70,000 staves, for the freight of \$55 per thousand, and to make two trips if all the staves could not be brought at one trip. Avendano & Bros. agreed to pay freight on 70,000 staves, whether they furnished that number for transportation or not, and the owners of the boat agreed "to forfeit the sum of one thousand dollars," if they failed to carry out the contract, except by reason of accidents beyond their control.

The answer admits that the Marcella transported under the contract about 57,000 staves, on which the freight amounted to \$3,132.80, but claims that respondents are entitled to a credit on this amount for \$1,011.40, for certain staves not delivered, and for cash advanced and costs paid, leaving a balance due of \$2,121.40, from which latter sum the respondents claim should be deducted the \$1,000 named in the contract, as the amount to be paid by the owners of the Marcella in case they did not perform the contract.

The only point in the case is whether the respondents, Avendano & Bros., are entitled to the credit of \$1,000 by reason of the failure of the Marcella to transport the 13,000 staves, the residue of the 70,000 named in the contract.

No question is made of the right of the Marcella to the freight earned on the 57,000 staves, although the contract was only partially performed.

The precise point to be determined is whether the \$1,000 named in the contract is to be considered a penalty merely, or as liquidated damages.

Suppose the Marcella had refused to perform any part of the contract, could the Avendano Bros. have recovered the \$1,000 for the breach? In answering this question, it is to be noted first, that where it is doubtful on the face of the instrument whether the sum mentioned was intended to be stipulated

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Taylor and others vs. Steamer Marcella.

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damages, or a penalty to cover actual damages, the courts hold it to be the latter. *Bearden v. Smith*, 11 S. C. Law Rep., 554.

One of the tests by which this question is to be solved is the language of the contract. In the contract under consideration, the word *damages* is not used. The language is, "We, the owners of the Marcella, agree to forfeit \$1,000 if we fail to carry out this contract." While no particular phraseology is held to govern absolutely, and although the term "liquidated damages" will not be conclusive, the phrase "penalty" is generally so, unless controlled by other very strong considerations. *Higginson v. Weld*, 14 Gray, 165; *Richards v. Edick*, 17 Barb., 260; *Leggett v. Ins. Co.*, 50 id., 616; *Powell v. Burroughs*, 54 Penn. St., 329.

The word penalty is not used in this contract, but the word *forfeit* is, which may fairly be regarded as an equivalent.

The verb "to forfeit" is defined, "to lose by some breach of condition; to lose by some offense."

The noun "forfeit" is defined to be "a forfeiture, a fine, a mulct."

The noun "penalty" is defined, "forfeiture, or a sum to be forfeited for noncompliance with an agreement, a fine." See Worcester's Dictionary.

These definitions show that the words *forfeit* and *penalty* are substantially synonymous, so that when the owners of the Marcella agreed, that in a certain contingency they would forfeit \$1,000, their meaning was, that the penalty for nonperformance should be that sum. So that the contract under consideration provided for a penalty to cover actual damages, and did not stipulate for liquidated damages.

The damages sustained by a breach of this contract were such as could, without difficulty, be ascertained. This is another reason for construing the contract to provide for a penalty to cover actual damages only. *Kimble v. Farren*, 6 Bing., 141; *Lampman v. Cochran*, 16 N. Y., 275; *Higginson v. Weld*, 14 Gray, 165; *Berry v. Wisdom*, 3 Ohio State, 241.

In *Taylor v. Sandford*, 7 Wheat, 13, MARSHALL, C. J., said:

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Taylor and others vs. Steamer Marcella.

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“In general, a sum of money to be paid in gross for the non-performance of an agreement is considered a penalty. It will not, of course, be considered as liquidated damages.”

But in the case under consideration there had been a part performance of the contract; by far the larger part of the service to be done had been performed, and there appears to have been an acceptance of such part performance.

In such a case the rule has been laid down, that when the contract is such that it can be separated, as to performance, so as to admit of an assessment of damages for a breach of one part and not of another, a party should not, for a small omission, be made responsible for the whole amount of damages specified. *Colwell v. Lawrence*, 38 Barb., 643; *Fitzpatrick v. Cottingham*, 14 Wis., 219.

In the case of *Shute v. Taylor*, 5 Metcalf, 61, the supreme court of Massachusetts, after stating it to be the tendency and preference of the law to regard a sum stated to be payable if a contract is not fulfilled, as a penalty and not as liquidated damages, held it decisive against the latter construction, that in the case before them there had been a part performance and an acceptance of such part performance.

These rules of construction and authorities, it seems to me, settle beyond controversy that the \$1,000 named in the contract of the *Marcella* is to be considered as a penalty only, to cover the actual damage arising from the nonperformance of the contract. The *Avendano Bros.* are, therefore, entitled to deduct in equity from the freight carried, only the actual damage sustained by the nonperformance of the contract, and cannot claim a credit for the \$1,000 as liquidated damages in full. As there is no actual damage shown or even claimed, they are not entitled to any reduction from the freight actually carried.

I have considered the question just as if the *Marcella* had attempted to offer no excuse for the nonperformance in full of her contract. It is claimed on her part, that she was disabled, and that the water in the bayou became so low as to be unnavigable for her, and that these facts excused the full per-

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formance of the contract, which provided for a failure arising from accidents beyond control.

But in the view I have taken of the contract, it is unnecessary to consider this question.

Let there be a decree that Avendano & Bros. pay into the registry of the court the sum of \$2,121.40, the freight due the Marcella, with interest from date of judicial demand, and without any deduction for damages.

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THE UNITED STATES VS. CERTAIN CIGARS, etc.

On the trial of a libel for the forfeiture of certain goods imported into the United States, because the vessel had no manifest of her cargo on board, it was shown that no part of the cargo had been unshipped after it was taken on board, and that a manifest had been delivered to the master by the consignors on the day the vessel cleared, but had been inadvertently lost by him before the ship sailed; *held*, that the case fell within the proviso of the 24th section of the act of March 2, 1799 (1 Stat., 646), and that the goods ought not to be condemned.

APPEAL from the District Court.

*Mr. J. R. Beckwith*, U. S. Attorney, for libellant.

*Messrs. T. J. Semmes and E. C. Billings*, for claimants.

WOODS, Circuit Judge. The 24th section of the act of March 2, 1799, entitled "an act to regulate the collection of duties on imports and tonnage" (1 Stat., 646), provides "that if any goods, wares and merchandise shall be imported or brought into the United States in any ship or vessel whatever, belonging in whole or in part to a citizen or citizens, inhabitant or inhabitants of the United States, from any foreign port or place, without having a manifest or manifests on board, \* \* or which shall not be included or described therein, or shall not agree therewith, \* \* all such merchandise not included in the manifest belonging or consigned to the master, mate, officers or crew of such ship or vessel, shall be forfeited; provided, always, if it

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shall be made to appear to the satisfaction of the collector, naval officer and surveyor, or to the major part of them, \* \* or to the satisfaction of the court in which a trial shall be had concerning any such forfeiture, that no part of the cargo of such ship or vessel had been unshipped after it was taken on board, except such as shall have been particularly specified and accounted for in the report of the master, or other person having the charge or command of such ship or vessel, and that the manifests had been lost or mislaid without fraud or collusion, or that the same was or were defaced by accident, or incorrect by mistake, in every such case the forfeiture aforesaid shall not be incurred."

The libel in this case is filed for the forfeiture of certain cigars and brandy alleged to have been fraudulently imported into the United States from the island of Cuba, about the 25th of November, 1871, on a vessel called the "Frank Atwood," said goods being consigned to the master, mate, officers and crew, and not being disclosed or included or described in any manifest of the cargo on board the said vessel, and because the said vessel had no manifest of her cargo aboard.

The answer of claimants denies that the goods were consigned as in the libel alleged; denies they were fraudulently imported, but admits that at the time of the arrival of the vessel at the port of New Orleans, the Frank Atwood had no manifest on board, but avers that when she left Havana, from which port she sailed direct to New Orleans, she had a complete manifest of the cargo, with every feature that the law required; that no part of the cargo was unshipped after it had been taken on board, and that the manifest had been by the master lost or mislaid.

This answer presents a perfect defense to the libel. Does the evidence sustain it?

It is established that the Frank Atwood sailed from Havana direct to New Orleans, and that no part of the cargo was unshipped during the voyage. It further appears in evidence that a manifest of the entire cargo was made up in the office of Bances & Co., in Havana, and with all the ship's papers put in

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an envelop and handed to the captain, on the day the ship cleared, which was the 12th of November, and on the 13th she sailed. This testimony is uncontradicted, and I have been unable to find anything in the record to throw suspicion upon it.

It is claimed by the district attorney, however, that there is no evidence to show that the manifest was ever on board the schooner; that if it was lost by the captain before he sailed as there is some evidence tending to show, the defense is not made out.

I do not so understand the law. It is an attempt at fraudulent importation that the law punishes. If the captain of the vessel, between the office of the consignors and his ship loses the manifest, and sails supposing it to be among the ship's papers, and the fact of such loss is made to appear, the cargo is protected by the statute. The loss of the manifest is made probable by the fact that under the circumstances of this case, there was nothing to be gained by sailing without one, or by destroying it after sailing.

I think the claimants have brought themselves within the protection of the proviso of section 24, and that this libel must therefore be dismissed.

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APRIL TERM, 1874.

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THE UNITED STATES VS. CRUIKSHANK and others.

*(The Grant Parish Case.)*

1. An indictment, under the enforcement act or civil rights bill, for violating civil rights, should state that the offense charged was committed against the person injured by reason of his race, color or previous condition of servitude.
2. A charge that the defendants conspired to injure certain persons of African descent, being citizens of the United States, thereby to prevent them from exercising their rights as citizens, such as the right

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to peaceably assemble, to bear arms, etc., unless accompanied with an averment that the injury was committed by reason of the race, color, or previous condition of servitude of the person conspired against, is not sustainable in the courts of the United States.

3. Congress has power to legislate for the enforcement of any right granted by the constitution; but the power must be exercised according to the nature of the grant or guaranty. If it only be that congress or the legislature of a state shall not pass laws for abridging the right, it is a guaranty against acts of the government only, state or federal, and not against the acts of individuals; and in such case congress has not power to legislate over the subject generally; but only to provide remedies or redress in case the legislature or congress itself (as the case may be) should violate the prohibition. The fourteenth amendment of the constitution does not change the power of congress in this respect.
4. The thirteenth amendment confers upon congress full power to legislate on the subject of slavery, and to pass all laws it may deem proper for its entire eradication in every form. The civil rights act of 1866 was within this power.
5. That act was intended to give to the colored race the rights of citizenship, and to protect them, as a race, or class, from unfriendly state legislation and from lawless combinations. An injury to a colored person, therefore, is not cognizable by the United States courts under that act, unless inflicted by reason of his race, color or previous condition of servitude. An ordinary crime against a colored person, without having that characteristic, is cognizable only in the state courts.
6. The fifteenth amendment does not confer upon congress the power to regulate the right to vote generally; but only to provide against discrimination on account of race, color or previous condition of servitude. Congress, therefore, cannot legislate in reference to any interference with the right to vote, which does not proceed from that cause, unless in elections of senators or representatives. A conspiracy to prevent a colored person from voting is no more a United States offense than a conspiracy to prevent a white person from voting, unless entered into by reason of the voter's race, color or previous condition of servitude.

This was an indictment under the enforcement act of May 31, 1870, against nearly one hundred persons, charging, in the first count, that on the 13th day of April, 1873, at Grant parish, in the state of Louisiana, the defendants unlawfully and feloniously did band together with the unlawful and felonious intent and purpose to injure, oppress, threaten and intimidate one Levi Nelson and one Alexander Tillman, being citizens of the

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United States of African descent, and persons of color, and in the peace of the state and the United States, with the unlawful and felonious intent thereby to hinder and prevent them in their free exercise and enjoyment of their lawful right and privilege to peaceably assemble together with each other and with other citizens of the United States for a peaceable and lawful purpose, the same being a right and privilege granted or secured to them in common with all other good citizens of the United States, by the constitution and laws of the United States, contrary to the form of the statute, etc. The ninth count repeated the same charge, changing only the words "band together," for the words "conspire together."

The seven counts following the first (with the corresponding seven counts following the ninth) charge a conspiracy to injure, oppress, threaten and intimidate the same persons with the intent to prevent and hinder them in the exercise and enjoyment of certain other rights and privileges, namely: in the second count, the right "to keep and bear arms for a lawful purpose;" in the third, with the intent "to deprive them of their lives and liberty of person without due process of law;" in the fourth, the right "to the full and equal benefit of all laws and proceedings enacted by the state or the United States for the security of persons and property, and enjoyed by white citizens;" in the fifth, "the rights, privileges, immunities and protection granted and secured to them as citizens of the United States and of Louisiana, by reason of their race and color, and because they were of African descent, and persons of color;" in the sixth, "the right to vote at any future election, knowing them to be qualified;" in the seventh, "with intent to put them in fear of bodily harm, injure and oppress them, because they had voted at a previous election held in November, 1872;" in the eighth, "every, each, all and singular the several rights and privileges granted or secured to them in common with all good citizens of the United States."

The last sixteen counts charged the murder of the same persons in executing the conspiracy.

Three of the defendants being convicted on the first sixteen

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counts of conspiracy only, motion was made in arrest of judgment, and argued by

*Messrs. R. H. Marr, E. John Ellis, W. R. Whitaker and Bryan;* for the defendants.

*Mr. J. R. Beckwith,* U. S. Attorney, for the United States.

The judges not being agreed, Mr. Circuit Justice BRADLEY delivered the following opinion in favor of the motion, which was granted accordingly, and the case was certified to the supreme court:

The indictment in this case is founded on the 6th and 7th sections of the act of congress approved May 31, 1870, entitled "an act to enforce the rights of citizens of the United States to vote in the several states of this Union, and for other purposes." (16 Stat., 140.) It contains two distinct series of counts, in one of which the defendants are charged with having unlawfully and feloniously banded or conspired together to intimidate certain persons of African descent (specified by name), and thereby to hinder and prevent them in, and deprive them of, the free exercise and enjoyment of certain supposed constitutional rights and privileges, respectively specified in the several counts of the indictment, such as, in one count, the right peaceably to assemble themselves together; in another, the right to keep and bear arms; in a third, the right to be protected against deprivation of life, liberty and property without due process of law; in a fourth, the right to the full and equal benefit of the laws; in another, the right to vote, etc. The second series of counts charges murder in addition to, and whilst carrying out, the conspiracies charged. Three of the defendants, Cruikshank, Hadnot and Irwin, have been convicted of conspiracy under the first series of counts, which are founded on the sixth section of the act, and now move in arrest of judgment, on the ground that the act is unconstitutional, and that the indictment does not charge any crime under it.

The main ground of objection is that the act is municipal in its character, operating directly on the conduct of individuals, and taking the place of ordinary state legislation; and that

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there is no constitutional authority for such an act, inasmuch as the state laws furnish adequate remedy for the alleged wrongs committed.

It cannot, of course, be denied that express power is given to congress to enforce by appropriate legislation the XIIIth, XIVth and XVth amendments of the constitution, but it is insisted that this act does not pursue the appropriate mode of doing this. A brief examination of its provisions is necessary more fully to understand the form in which the questions arise.

The first section provides that all citizens of the United States, otherwise qualified, shall be allowed to vote at all elections in any state, county, city, township, etc., without distinction of race, color or previous condition of servitude, any constitution, law, custom or usage of any state or territory to the contrary notwithstanding.

This is not quite the converse of the XVth amendment. That amendment does not establish the right of any citizens to vote; it merely declares that race, color or previous condition of servitude shall not exclude them. This is an important distinction, and has a decided bearing on the questions at issue.

The second section requires that equal opportunity shall be given to all citizens, without distinction of race, color or previous condition of servitude, to perform any act required as a prerequisite or qualification for voting, and makes it a penal offense for officers and others to refuse or omit to give such equal opportunity.

The third section makes the offer to perform such preparatory act, if not performed by reason of such wrongful act or omission of the officers or others, equivalent to performance; and makes it the duty of inspectors or judges of election, on affidavit of such offer being made, to receive the party's vote; and makes it a penal offense to refuse to do so.

These three sections relate to the right secured by the XVth amendment.

The fourth section makes it a penal offense for any person, by force, bribery, threats, etc., to hinder or prevent, or to conspire with others to hinder or prevent, *any citizen* from perform-

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ing any preparatory act requisite to qualify him to vote, or from voting, at *any election*.

This section does not seem to be based on the XVth amendment, nor to relate to the specific right secured thereby. It extends far beyond the scope of the amendment, as will more fully appear hereafter.

The fifth section makes it a penal offense for any person to prevent or attempt to prevent, hinder or intimidate any person from exercising the right of suffrage, to whom it is secured by the XVth amendment, by means of bribery, threats, or threats of depriving of occupation, or of ejecting from lands or tenements, or of refusing to renew a lease, or of violence to such person or his family.

The sixth section, under which the first sixteen counts of the indictment are framed, contains two distinct clauses: the first declares that "if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another with intent (to violate any provision of this act), such persons shall be held guilty of felony." Of course this would include conspiracy to prevent any person from voting, or from performing any preparatory act requisite thereto. The next clause has a larger scope. Repeating the introductory and concluding words, it is as follows: "If two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another with intent to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony." Here it is made penal to enter into a conspiracy to injure or intimidate any citizen, with intent to prevent or hinder his exercise and enjoyment, not merely of the right to vote, but of any right or privilege granted or secured to him by the constitution or laws of the United States.

The question is at once suggested, Under what clause of the constitution does the power to enact such a law arise?

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It is undoubtedly a sound proposition, that whenever a right is guarantied by the constitution of the United States, congress has the power to provide for its enforcement, either by implication arising from the correlative duty of government to protect, wherever a right to the citizen is conferred, or under the general power (contained in art. I, sec. VIII, par. 18) "to make all laws necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or any department or officer thereof."

It was on the principle first stated that the fugitive slave law was sustained by the supreme court of the United States. (*Prigg v. Pennsylvania*, 16 Pet., 539.) The constitution guarantied the rendition of fugitives held to labor or service in any state, and it was held that congress had, by implication, the power to enforce the guaranty by legislation. "They require," says Justice STORY, delivering the opinion of the majority of the court, "the aid of legislation to protect the right, to enforce the delivery, and to secure the subsequent possession of the slave. If, indeed, the constitution guaranties the right, and if it requires the delivery upon the claim of the owner (as cannot well be doubted), the natural inference certainly is, that the national government is clothed with the appropriate authority and functions to enforce it. The fundamental principle applicable to all cases of this sort would seem to be, that where the end is required, the means are given; and, where the duty is enjoined, the ability to perform it is contemplated to exist on the part of the functionaries to whom it is entrusted. The clause is found in the national constitution and not in that of any state. It does not point out any state functionaries, or any state action to carry its provisions into effect. The state, therefore, cannot be compelled to enforce them, etc. The natural if not the necessary conclusion is, that the national government, in the absence of all positive provisions to the contrary, is bound, through its own departments, legislative, judicial, or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the constitution." \* \*

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To the objection that the power did not fall within the scope of the enumerated powers of legislation confided to congress, Justice STOKY answers: "Stripped of its artificial and technical structure, the argument comes to this, that, although rights are exclusively secured by, or duties are exclusively imposed upon, the national government, yet, unless the power to enforce these rights or to execute these duties can be found among the express powers of legislation enumerated in the constitution, they remain without any means of giving them effect by any act of congress, and they must operate solely *proprio vigore*, however defective may be their operation; nay, even although in a practical sense, they may become a nullity from the want of a proper remedy to enforce them, or to provide against their violation. If this be the true interpretation of the constitution, it must, in a great measure, fail to attain many of its avowed and positive objects as a security of rights and a recognition of duties. Such a limited construction of the constitution has never yet been adopted as correct, either in theory or practice." 16 Pet., 618.

It seems to be firmly established by the unanimous opinion of the judges in the above quoted case that congress has power to enforce, by appropriate legislation, every right and privilege given or guaranteed by the constitution. The method of enforcement, or the legislation appropriate to that end, will depend upon the character of the right conferred. It may be by the establishment of regulations for attaining the object of the right, the imposition of penalties for its violation or the institution of judicial procedure for its vindication when assailed, or when ignored by the state courts; or it may be by all of these together. One method of enforcement may be applicable to one fundamental right, and not applicable to another.

With regard to those acknowledged rights and privileges of the citizen, which form a part of his political inheritance derived from the mother country, and which were challenged and vindicated by centuries of stubborn resistance to arbitrary power, they belong to him as his birthright, and it is the duty of the particular state of which he is a citizen to protect and

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enforce them, and to do naught to deprive him of their full enjoyment. When any of these rights and privileges are secured in the constitution of the United States only by a declaration that the state or the United States shall not violate or abridge them, it is at once understood that they are not created or conferred by the constitution, but that the constitution only guaranties that they shall not be impaired by the state, or the United States, as the case may be. The fulfillment of this guaranty by the United States is the only duty with which that government is charged. The affirmative enforcement of the rights and privileges themselves, unless something more is expressed, does not devolve upon it, but belongs to the state government as a part of its residuary sovereignty.

For example, when it is declared that no state shall deprive any person of life, liberty, or property without due process of law, this declaration is not intended as a guaranty against the commission of murder, false imprisonment, robbery, or any other crime committed by individual malefactors, so as to give congress the power to pass laws for the punishment of such crimes in the several states generally. It is a constitutional security against arbitrary and unjust legislation by which a man may be proceeded against in a summary manner and arbitrarily arrested and condemned, without the benefit of those time-honored forms of proceeding in open court and trial by jury, which is the clear right of every freeman, both in the parent country and in this. It is a guaranty of protection against the acts of the state government itself. It is a guaranty against the exertion of arbitrary and tyrannical power on the part of the government and legislature of the state, not a guaranty against the commission of individual offenses; and the power of congress, whether implied or expressed, to legislate for the enforcement of such a guaranty, does not extend to the passage of laws for the suppression of ordinary crime within the states. This would be to clothe congress with power to pass laws for the general preservation of social order in every state. The enforcement of the guaranty does not require or authorize congress to perform the duty which the

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guaranty itself supposes it to be the duty of the state to perform, and which it requires the state to perform. The duty and power of enforcement take their inception from the moment that the state fails to comply with the duty enjoined, or violates the prohibition imposed. No state may pass a law impairing the obligation of contracts. Does this authorize congress to pass laws for the general enforcement of contracts in the states? Certainly not. But when the state has passed a law which violates the prohibition, congress may provide a remedy. It did so in the 25th section of the judiciary act by authorizing an appeal to the supreme court of the United States of all cases where a constitutional or federal right should be denied or overruled in a state court.

Again, "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." But this does not authorize congress to pass a general system of municipal law for the security of person and property, to have effect in the several states for the protection of citizens of other states to whom the fundamental right is guaranteed. It only authorizes appropriate and efficient remedies to be provided in case the guaranty is violated.

Where affirmative legislation is required to give the citizen the right guaranteed, congress may undoubtedly adopt it, as was done in the case of the fugitive slave law and as has been done in later times, to carry into full effect the XIIIth amendment of the constitution by the passage of the civil rights bill, as will be more fully noted hereafter. But with regard to mere constitutional prohibitions of state interference with established or acknowledged privileges and immunities, the appropriate legislation to enforce such prohibitions is that which may be necessary or proper for furnishing suitable redress when such prohibitions are disregarded or violated. Where no violation is attempted, the interference of congress would be officious, unnecessary, and inappropriate.

The bearing of these observations on the effect of the several recent amendments of the constitution, in conferring legislative powers upon congress, is next to be noticed.

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Then, of course, congress could provide remedies for their security and protection. But, in ordinary cases, where the laws of the state are not obnoxious to the provisions of the amendment, the duty of congress in the creation and punishment of offenses is limited to those offenses which aim at the deprivation of the colored citizen's enjoyment and exercise of his rights of citizenship and of equal protection of the laws because of his race, color, or previous condition of servitude.

To illustrate: if in a community or neighborhood composed principally of whites, a citizen of African descent, or of the Indian race, not within the exception of the amendment, should propose to lease and cultivate a farm, and a combination should be formed to expel him and prevent him from the accomplishment of his purpose on account of his race or color, it cannot be doubted that this would be a case within the power of congress to remedy and redress. It would be a case of interference with that person's exercise of his equal rights as a citizen because of his race. But if that person should be injured in his person or property by any wrong-doer for the mere felonious or wrongful purpose of malice, revenge, hatred, or gain, without any design to interfere with his rights of citizenship or equality before the laws, as being a person of a different race and color from the white race, it would be an ordinary crime, punishable by the state laws only.

To constitute an offense, therefore, of which congress and the courts of the United States have a right to take cognizance under this amendment, there must be a design to injure a person, or deprive him of his equal right of enjoying the protection of the laws, by reason of his race, color, or previous condition of servitude. Otherwise it is a case exclusively within the jurisdiction of the state and its courts.

I will next consider the effect of the XVth amendment, to enforce which the law under consideration was primarily framed. The amendment declares that "the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude," and power is given to con-

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gress to enforce the amendment by appropriate legislation. Although negative in form, and therefore, at first view, apparently to be governed by the rule that congress has no duty to perform until the state has violated its provisions, nevertheless in substance, it confers a positive right which did not exist before. The language is peculiar. It is composed of two negatives. The right shall *not be denied*. That is, the right *shall be* enjoyed; the right, namely, to be exempt from the disability of race, color, or previous condition of servitude, as respects the right to vote. In terms it has a general application to all, but the history of the events out of which the amendment grew shows that it was principally intended to confer upon colored citizens the right of suffrage. The majority of the court in the recent *Slaughter House Cases*, say: "In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause." (Speaking of that clause in the XIVth amendment which prohibits the states from denying to any person within its jurisdiction, the equal protection of the laws.) "The existence of laws in the states where the newly emancipated negroes existed, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden. \* \* We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision." 16 Wall., 81.

Whether this suggestion of the court, that the recent amendments were intended for the benefit of the African race alone, be accepted or not, it is manifest that the XVth amendment was primarily and principally intended for their benefit, and that it does have the affirmative effect before stated of conferring upon them an equal right to vote with that enjoyed by white citizens. It was, in fact, a constitutional extension of the civil rights bill passed in 1866, conferring upon the emancipated slave (as well as all persons of his race) another specific right

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in addition to those enumerated in that bill ; and it is to be interpreted on the same general principles.

But whilst the amendment has the effect adverted to, it must be remembered that the right conferred and guarantied is not an absolute, but a relative one. It does not confer the right to vote. That is the prerogative of the state laws. It only confers a right not to be excluded from voting by reason of race, color or previous condition of servitude, and *this is all the right that congress can enforce*. It confers upon citizens of the African race the same right to vote as white citizens possess. It makes them equal. This is the whole scope of the amendment. The powers of congress, therefore, are confined within this scope.

The amendment does not confer upon congress any power to regulate elections or the right of voting where it did not have that power before, except in the particular matter specified. It does, however, confer upon congress the right of enforcing the prohibition imposed against excluding citizens of the United States on account of race, color, or previous condition of servitude. Before the amendment congress had the power to regulate elections and the right of voting in the District of Columbia and in the territories, and to regulate (by altering any regulations made by the state) the time, place and manner of holding elections for senators and representatives in the several states. It has that power still, subject to the prohibition of the amendment. Also, before the amendment, the states had the power to regulate all state elections and the right of voting therein. They have that power still, subject to the prohibition of the amendment and the right of congress to enforce it. Congress has not acquired any additional right to regulate the latter elections, or the right of voting therein, which it did not possess before, except the power to enforce the prohibition imposed on the states, and the equal right acquired by all races and colors to vote.

The manner in which the prohibition (or the equal right to vote) may be enforced is, of course, the question of principal interest in this inquiry.

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When the right of citizens of the United States to vote is denied or abridged by a state on account of their race, color, or previous condition of servitude, either by withholding the right itself or the remedies which are given to other citizens to enforce it, then, undoubtedly, congress has the power to pass laws to directly enforce the right and punish individuals for its violation, because that would be the only appropriate and efficient mode of enforcing the amendment. Congress cannot, with any propriety, or to any good purpose, pass laws forbidding the state legislature to deny or abridge the right, nor declaring void any state legislation adopted for that end. The prohibition is already in the constitutional amendment, and laws in violation of it are absolutely void by virtue of that prohibition. So far as relates to rendering null and void the obnoxious law, it is done already; but that does not help the person entitled to vote. By the supposition the state law gives him no remedy and no redress. It is clear, therefore, that the only practical way in which congress can enforce the amendment is by itself giving a remedy and giving redress. If the party should be sued in the state court for attempting to exercise his right, of course the appeal to the supreme court of the United States, given by the twenty-fifth section of the judiciary act, would be all the remedy he would need; but it would be entirely inefficient in securing to him the actual exercise of his right to vote.

But suppose that the laws of the state are in harmony with the amendment, at least contain nothing repugnant thereto; has congress the power to pass laws concurrently with the state to enforce the right of every race and color, without regard to the previous condition of servitude, to an equality in the right to vote?

There is no essential incongruity in the coexistence of concurrent laws, state and federal, for the punishment of the same unlawful acts as offenses both against the laws of the state and the laws of the United States. Robbery of the mails, counterfeiting the coin, assaults upon a United States marshal or other officer while in the performance of his duty, and many

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other cases of like nature, will readily suggest themselves. *Moore v. Illinois*, 14 How., 20.

Mr. Justice GRIER, in delivering the opinion of the supreme court in the case cited, says: "Every citizen of the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. Thus, an assault upon the marshal of the United States, and hindering him in the execution of legal process, is a high offense against the United States, for which the perpetrator is liable to punishment; and the same act may be also a gross breach of the peace of the state, a riot, assault, or a murder, and subject the same person to a punishment, under the state laws, for a misdemeanor or felony. That either or both may (if they see fit) punish such an offender cannot be doubted."

The real difficulty in the present case is to determine whether the amendment has given to congress any power to legislate except to furnish redress in cases where the states violate the amendment.

Considering, as before intimated, that the amendment, notwithstanding its negative form, substantially guaranties the equal right to vote to citizens of every race and color, I am inclined to the opinion that congress has the power to secure that right not only as against the unfriendly operation of state laws, but against outrage, violence, and combinations on the part of individuals, irrespective of the state laws. Such was the opinion of congress itself in passing the law at a time when many of its members were the same who had consulted upon the original form of the amendment in proposing it to the states. And as such a construction of the amendment is admissible, and the question is one at least of grave doubt, it would be assuming a great deal for this court to decide the law, to the extent indicated, unconstitutional.

But the limitations which are prescribed by the amendment must not be lost sight of. It is not the right to vote which is guarantied to all citizens. Congress cannot interfere with the

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regulation of that right by the states except to prevent by appropriate legislation any distinction as to race, color, or previous condition of servitude. The state may establish any other conditions and discriminations it pleases, whether as to age, sex, property, education, or anything else. Congress, so far as the XVth amendment is concerned, is limited to the one subject of discrimination — on account of race, color or previous condition of servitude. It can regulate as to nothing else. No interference with a person's right to vote, unless made on account of his race, color or previous condition of servitude, is subject to congressional animadversion. There may be a conspiracy to prevent persons from voting having no reference to this discrimination. It may include whites as well as blacks, or may be confined altogether to the latter. It may have reference to the particular politics of the parties. All such conspiracies are amenable to the state laws alone. To bring them within the scope of the amendment and of the powers of congress they must have for motive the race, color or previous condition of servitude of the party whose right is assailed.

According to my view the law on the subject may be generalized in the following proposition :

The *war of race*, whether it assumes the dimensions of civil strife or domestic violence, whether carried on in a guerrilla or predatory form, or by private combination, or even by private outrage or intimidation, is subject to the jurisdiction of the government of the United States ; and when any atrocity is committed which may be assigned to this cause it may be punished by the laws and in the courts of the United States ; but any outrages, atrocities, or conspiracies, whether against the colored race or the white race, which do not flow from this cause, but spring from the ordinary felonious or criminal intent which prompts to such unlawful acts, are not within the jurisdiction of the United States, but within the sole jurisdiction of the states, unless, indeed, the state, by its laws, denies to any particular race equality of rights, in which case the government of the United States may furnish remedy and redress to the fullest extent and in the most direct manner. Unless this distinction

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be made we are driven to one of two extremes — either that congress can never interfere where the state laws are unobjectionable, however remiss the state authorities may be in executing them, and however much a proscribed race may be oppressed; or that congress may pass an entire body of municipal law for the protection of person and property within the states, to operate concurrently with the state laws, for the protection and benefit of a particular class of the community. This fundamental principle, I think, applies to both the XIIIth and XVth amendments.

After what has been said, a few observations will suffice as to the effect of the XIVth amendment upon the questions under consideration.

It is claimed that, by this amendment, congress is empowered to pass laws for directly enforcing all privileges and immunities of citizens of the United States by original proceedings in the courts of the United States, because it provides, amongst other things, that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, and because it gives congress power to enforce its provisions by appropriate legislation. If the power to enforce the amendment were equivalent to the power to legislate generally on the subject matter of the privileges and immunities referred to, this would be a legitimate conclusion. But, as before intimated, that subject matter may consist of rights and privileges not derived from the grants of the constitution, but from those inherited privileges which belong to every citizen, as his birthright, or from that body of natural rights which are recognized and regarded as sacred in all free governments; and the only manner in which the constitution recognizes them may be in a prohibition against the government of the United States, or the state governments, interfering with them.

It is obvious, therefore, that the manner of enforcing the provisions of this amendment will depend upon the character of the privilege or immunity in question. If simply prohibitory of governmental action there will be nothing to enforce

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until such action is undertaken. How can a prohibition, in the nature of things, be enforced until it is violated? Laws may be passed in advance to meet the contingency of a violation, but they can have no application until it occurs.

On the other hand, when the provision is violated by the passage of an obnoxious law, such law is clearly void, and all acts done under it will be trespasses. The legislation required from congress, therefore, is such as will provide a preventive or compensatory remedy or due punishment for such trespasses; and appeals from the state courts to the United States courts in cases that come up for adjudication.

If these views are correct, there can be no constitutional legislation of congress for directly enforcing the privileges and immunities of citizens of the United States by original proceedings in the courts of the United States, where the only constitutional guaranty of such privileges and immunities is, that no state shall pass any law to abridge them, and where the state has passed no laws adverse to them, but, on the contrary, has passed laws to sustain and enforce them.

I will now proceed to examine the several counts in the indictment, and endeavor to test their validity by the principles which have been laid down. These have been so fully enunciated and explained, that a very brief examination of the counts will suffice.

The first count is for a conspiracy to interfere with the right "to peaceably assemble together with each other, and with other citizens, for a peaceable and lawful purpose." This right is guarantied in the first amendment to the constitution, which declares that "congress shall make no law abridging the right of the people peaceably to assemble and to petition the government for a redress of grievances." Does this disaffirmance of the power of congress to prevent the assembling of the people amount to an affirmative power to punish individuals for disturbing assemblies? This would be a strange inference. That is the prerogative of the states. It belongs to the preservation of the public peace and the fundamental rights of the people. The people of the states do not ask con-

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gress to protect the right, but demand that it shall not interfere with it.

Has anything since occurred to give congress legislative power over the subject matter? The XIVth amendment declares that no state shall by law abridge the privileges or immunities of citizens of the United States. Grant that this prohibition now prevents the states from interfering with the right to assemble, as being one of such privileges and immunities, still, does it give congress power to legislate over the subject? Power to enforce the amendment is all that is given to congress. If the amendment is not violated, it has no power over the subject.

The second count, which is for a conspiracy to interfere with certain citizens in their right to bear arms, is open to the same criticism as the first.

The third count charges a conspiracy to deprive certain citizens of African descent of their lives and liberties without due process of law. Every murderer and robber does this. Congress surely is not vested with power to legislate for the suppression and punishment of all murders, robberies, and assaults committed within the states. In none of these counts is there any averment that the state had, by its laws, interfered with any of the rights referred to, or that it had attempted to deprive the citizens of life, liberty, or property without due process of law, or that it did not afford to all the equal protection of the laws. The third count cannot be sustained.

The fourth count charges a conspiracy to deprive certain colored citizens of African descent, of the free exercise and enjoyment of the right and privilege to the full and equal benefit of all laws and proceedings for the security of persons and property which is enjoyed by the white citizens.

The right and privilege to interfere with the exercise of which is here alleged to have been the object of the conspiracy is not contained in the constitution in express terms. The XIVth amendment, amongst other things, declares that no state shall deny to any person within its jurisdiction the equal protection of the laws. But the indictment does not allege that this has

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been done. The count manifestly refers to the rights secured by the civil rights bill of April 9th, 1866, which has already been referred to. That act, as we have seen, expressly declares that all citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude, shall have the same right in every state and territory to make and enforce contracts, etc., and to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens.

The conspiracy charged in the fourth count is a conspiracy to interfere with the free exercise and enjoyment of this right.

But the count does not contain any allegation that the defendants committed the acts complained of with a design to deprive the injured persons of their rights on account of their race, color or previous condition of servitude. This, as we have seen, is an essential ingredient in the crime to bring it within the cognizance of the United States authorities. Perhaps such a design may be inferred from the allegation that the persons injured were of the African race, and that the intent was to deprive them of the exercise and enjoyment of the rights enjoyed by white citizens. But it ought not to have been left to inference; it should have been alleged.

On this ground, therefore, I think this count is defective and cannot be sustained.

It is also defective on account of the vagueness and generality of the charge — “to prevent and hinder (them) in the free exercise and enjoyment of their several and respective right and privilege to the full and equal benefit of all laws and proceedings then and there enacted,” etc. It seems to me that such a general and sweeping charge, without any specification of any laws or proceedings, does not amount to the averment of a criminal act. It is not merely informal, it is insufficient.

The fifth and eighth counts are open to the same objection of vagueness and generality as the fourth, and for that reason neither of them can, in my judgment, be sustained.

The sixth count charges a conspiracy to prevent and hinder certain citizens of the United States, who were of African de-

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scent and persons of color, in the exercise and enjoyment of their right to vote at any election to be thereafter held in the state of Louisiana, or in the parish of Grant, knowing they had such right to vote. A conspiracy to hinder a person from exercising his right to vote at any election is made indictable by the fourth section of the enforcement act; also by the sixth section, read in connection with the first.

Over the general subject of the right to vote in the states, and the regulation of said right, congress, as we have seen, has no power to legislate. The fifteenth amendment relates only to discriminations on account of race, color and previous condition of servitude, and, as we have before shown, is a prohibition against the making of such discriminations.

The law on which this count is founded is not confined to cases of discrimination above referred to. It is general and universal in its application. Such a law is not supported by the constitution. The charge contained in the count does not describe a criminal offense known to any valid and constitutional law of the United States. It should, at least, have been shown that the conspiracy was entered into to deprive the injured persons of their right to vote by reason of their race, color or previous condition of servitude.

This count I also regard as invalid.

The seventh count charges a conspiracy to injure and oppress certain colored citizens of African descent because, being duly qualified to vote, they had exercised their right to do so, and had voted at the election held in Louisiana, in November, 1872, and at other times. This count is subject to the same objection as the last, and is invalid for the same reason.

The next eight counts on which the verdict was found are literal copies, respectively, of the first eight, so far as relates to the language on which their validity depends. The same observations apply to them which apply to the first eight.

In my opinion the motion in arrest of judgment must be granted.

NOTE.—The great interest felt in the questions discussed in the foregoing opinion has induced its publication in advance of its chronological order. — REP.

# **EASTERN DISTRICT OF TEXAS.**

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**GALVESTON, MAY TERM, 1870.**

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## **COWDREY VS. THE RAILROAD COMPANY and others.**

- 1. When the accounts of a receiver are referred to a master for report, no exceptions thereto will be considered by the court unless first made before the master.**
- 2. This rule would not, however, deter the court from directing an account to be reformed which contained manifest errors, or clearly improper charges.**
- 3. A receiver is an officer of the court as well as the master, and states his own accounts and submits them to the master for inspection, under the order of the court, the master acting in place of the court in a judicial rather than ministerial capacity.**
- 4. Exceptions to the master's report do not lie in such cases. Nevertheless, if the master adopt any erroneous principle in allowing a receiver's account, the court, on petition, will refer the matter back to him for correction.**
- 5. When a report upon a receiver's account is submitted by a master, the duty of the court consists in reviewing the principles and rules adopted by the master in allowing the accounts, rather than in examining the items in detail, or the evidence on which they are founded.**
- 6. All outlays of the receiver of a railroad intrusted with its management and operation, made in good faith, in the ordinary course, with a view to advance and promote the business of the road and make it profitable and successful, are fairly within the line of the discretion necessarily allowed him.**
- 7. In extraordinary cases, involving a large outlay of money, the receiver should always apply to the court in advance for authority to make the purchase or improvement proposed.**
- 8. Except in extraordinary cases, the submission by the receiver, at frequent intervals, of his accounts to the master, giving the latter an opportunity to disallow whatever he may not approve, will be regarded as a sufficient reference to the court for its ratification of the receiver's proceedings.**

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9. The receiver's expenses for counsel and witness fees, incurred in resisting a motion for his removal, allowed as a charge against the trust fund when it appeared that he had acted in good faith and with integrity of purpose, and when it further appeared that there were apparent grounds for the motion.
10. The question of allowance to the receiver for his services is one that properly belongs to the master's office, and not to the court.
11. When there is nothing in the administration of the trust to convict the receiver of want of integrity or good faith, want of foresight in regard to the future developments of business is no reason for denying him compensation or reducing its amount, especially when the trust has been administered with reasonable success.
12. What another, even competent, person would have done the work for, is not the proper rule in fixing the compensation of a receiver. It is to be graduated somewhat by the duties, and somewhat by the responsibilities of the office.
13. Defendants, in a suit in equity to foreclose a mortgage on a railroad, agreed with complainants that on giving security in the sum of \$350,000, they should have possession of the road and name the receiver, and the bond was given according to this agreement, and one of complainants appointed receiver: *Held*, that defendants could not object to such receiver unless he committed some act of unfaithfulness to his trust, and the court refused a motion to discharge the receiver, the evidence failing to show any want of faithfulness on his part since his appointment.
14. While the principal cause was pending in the supreme court of the United States, the circuit court refused to authorize the receiver to make any radical change in the condition of the railroad property by purchasing the bridge across Galveston Bay, or by building or contracting to use a new junction road through the city of Houston.

The principal case in this suit is reported in 11 Wall., 459. *Galveston Railroad v. Cowdrey*.

The following opinion was delivered at Galveston, in May term, 1870, upon points arising in the management of the property, by a receiver, pending the appeal of the principal cause in the supreme court:

The bill was filed, February 12, 1867, to foreclose three several mortgages, given on the railroad and its franchises. Tipton Walker, Esq., was appointed receiver, and acted as such until October 1, 1869, when, by consent of parties, N. A. Cowdrey, one of the complainants, was appointed, giving security to the amount of \$350,000. The first receiver having rendered his ac-

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counts, the same were referred to different masters for examination, who reported thereon. Both parties excepted to these reports. The defendants also moved for the dismissal of Cowdrey as receiver.

The latter moved for authority to make certain expenditures in the management of the road.

All these matters came up for hearing before Mr. Circuit Justice BRADLEY, when, after much argument and discussion, the following opinion was delivered and the following orders made:

*Messrs. Jer. S. Black and Wm. P. Ballinger*, for defendants.  
*Mr. W. G. Hale*, for Cowdrey, receiver.

BRADLEY, Circuit Justice. I. The first exceptions presented, are to the report of master Hughes, made upon the accounts of Tipton Walker, receiver, for the months of February, March and April, 1867.

The first exception is, that the defendants had no notice of the time and place of proceeding before the master in respect to said accounts. This appears not to be founded in fact. Due notice is shown to have been given to the solicitors of the defendants.

None of the exceptions were made or taken before the master. No objection to these accounts appears to have been made before him.

It is well settled that unless exceptions are taken before the master, they cannot afterwards be taken before the court. This is required in justice both to the master and to the receiver. To the master, that he may have an opportunity to reconsider his decision; to the receiver, that he may sustain his account (if he can), by additional evidence, or make such explanation as the case may require. This rule, it is true, would not deter the court from directing an account to be reformed which contained manifest errors or plainly improper charges; but such errors or improper charges ought to be clearly shown to exist, and their character as such ought to be evinced by the proofs in the case or by their intrinsic nature.

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I am not satisfied that any of these exceptions are thus sustained; and therefore feel bound to overrule them.

II. The next exceptions presented are to the report of master Waul, made upon the accounts of Tipton Walker, receiver, for the consecutive months commencing with May, 1867, and ending with November, 1868.

These exceptions are founded upon objections made before the master, and are, therefore, properly taken here — so far as exceptions (properly so called) can be taken to the report of a master on a receiver's accounts. For the books make a distinction between a master's report on a receiver's account and a master's report containing an account taken and stated by himself, or a report upon a matter referred to him for his own investigation and ascertainment.

A receiver is an officer of the court as well as a master, and states his own accounts and submits them to a master for inspection under the order of the court; the master acting in place of the court, in a judicial, rather than a ministerial capacity.

Strictly speaking, exceptions to his report in such cases do not properly lie, as they do to an account stated by himself, as in the case of executors, administrators, trustees or partners, who are ordered to account before him. Nevertheless, if the master adopt any erroneous principle in allowing a receiver's account, the court, on petition of the proper parties, will refer the matter back to him for correction.

The exceptions now presented, if we disregard the form, may be viewed substantially in the light of such a petition. But the distinction should be kept in view. For upon this distinction depends, in considerable degree, the nature of the duty now devolved upon the court. That duty consists in reviewing the principles and rules adopted and followed by the master in allowing the receiver's accounts, rather than in examining the items of the account in detail, or the evidence on which those items are severally founded; the latter duty belonging, more especially, to the province of the master acting in his judicial capacity; analagous to the province and duty of

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a jury on questions of fact. In this case there are several classes of charges for disbursements made by the receiver, which can be considered in groups, and with reference to which the principles by which the master was guided in allowing the account can be reviewed. The first class which I shall consider embraces the charges for rebatement of freight, being an allowance returned to shippers of cotton, in consideration of securing their business and good will on the road. It is in proof, that this is equivalent to the allowance of drawbacks made by many transportation lines in the country; that it is a customary, or at least quite a usual thing; that it was necessary in this case in order to secure business on the railroad, as it had been previously adopted by a competing line; that it actually had the effect of bringing a large amount of business upon the road; and that, without it, the road would not have paid expenses.

Whatever objection to these rebatements might be made by the state, or by planters and others who did not obtain like favorable terms, it does not lie in the mouths of stockholders or creditors who reap positive benefits from the arrangement to complain of it. Their doing so is calculated to raise a suspicion that they are solicitous about other interests than those which they have in the prosperity of this road.

The court concurs with the master in opinion, that the receiver was justified in adopting the arrangement; and that the exceptions to that class of charges should be disallowed.

The next class of charges relates to the purchase of a truck wagon and a pair of horses and harness, for the delivery of freight in the city of Houston, and the expenses of taking care of and keeping the same. It is in proof that that this was also a necessary and profitable outlay for enabling the railroad, by furnishing additional accommodations to customers, to compete with an opposition line.

The court concurs with the master in allowing these charges, and disallowing the exceptions thereto. The outlay was fairly within the discretionary powers of the receiver in managing and carrying on the railroad with prudence and economy.

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The same may be said with regard to drayage and wharfage; and the exceptions in reference thereto will be disallowed. And it may be laid down as a general proposition that all outlays made by the receiver in good faith, in the ordinary course, with a view to advance and promote the business of the road, and to render it profitable and successful are fairly within the line of discretion which is necessarily allowed to a receiver entrusted with the management and operation of a railroad in his hands. His duties, and the discretion with which he is invested are very different from those of a passive receiver, appointed merely to collect and hold moneys due on prior transactions, or rents accruing from houses and lands. And to such outlays in ordinary course, may properly be referred, not only the keeping of the road, buildings and rolling stock, in repair, but also the providing of such additional accommodations, stock and instrumentalities as the necessities of the business may require, always referring to the court, or to the master appointed in that behalf, for advice and authority in any matter of importance, which may involve a considerable outlay of money in lump. And except in extraordinary cases, the submission by the receiver of his accounts to the master at frequent intervals, whereby the latter may ascertain from time to time the character of the expenditures made, and disallow whatever may not meet his approval, will be regarded as a sufficient reference to the court for its ratification of the receiver's proceedings. In extraordinary cases, involving a large outlay of money, the receiver should always apply to the court in advance, and obtain its authority for the purchase or improvement proposed.

With these principles in view, the court has carefully examined the master's report, and the reasons given by him for disallowing the exceptions taken to the receiver's account, as well as the evidence taken in relation thereto, and sees no reason, in the main, to differ from him in the conclusions to which he has arrived. On the contrary, the court feels bound to express its approbation of the apparent carefulness and good judgment with which the master has performed his duty.

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The exceptions of the defendants to the master's report are, therefore, overruled.

The receiver, on his part, has filed exceptions to the report, because of the master's disallowance of certain charges in the account. The first of these relates to the purchase of a pair of new scales, or balances, for the sum of \$463.55. The master disallows this item on the score of improvidence. As these scales were procured in good faith, and for no possible advantage to the receiver himself, and remain amongst the assets and property of the road, I think the charge should have been allowed.

This exception to the report is therefore allowed.

The next exception of the receiver relates to the rent paid for offices. It is alleged that the receiver rented more office room than was necessary for his purposes, and the master has deducted two items of \$125 each from the amount paid for that purpose. It seems to me, from the evidence of Mr. Hitchcock, and the receiver himself, that the latter was justified, under the circumstances, in the expenditure made by him on this account.

This exception is therefore sustained.

The next exception of the receiver relates to the items of \$260.65, and \$260, for advertising the accommodations of the road in New Orleans. The advertisement contains a favorable reference to Walker, Kent & Co., as proper persons to facilitate the forwarding of freight. For the reasons stated by the master I am satisfied with his decision on these items, and disallow the exception. It is true that the receiver has shown that he was not interested in the firm of Walker, Kent & Co., but the use of his name in the firm, with his consent, made him liable for its obligations, and to that extent he was interested in its success; an advertisement therefore which had for its object, in whole or in part, the promotion of the interests of that firm should not be charged to the fund of which the receiver was a trustee.

The next exception of the receiver relates to the master's disallowance of interest paid by him for money borrowed of the bank. The master disallowed this interest because, as the

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accounts appeared before him, the receiver had large balances of money on hand at the time when he made the loans on which the interest in question accrued. But it has since been shown (and I think satisfactorily), in corroboration of what the receiver himself alleged under oath, that these balances were fictitious; that large amounts had been paid out by the receiver for which he had not obtained the proper vouchers when the balances were made up; and that he was obliged to make the loans in question in order to carry on the operations of the road. I am, therefore, satisfied that the disbursements for interest were proper, and that the receiver's exception to the report in reference thereto should be allowed.

The final exception of the receiver relates to the disallowance of his salary. As this subject will be separately discussed I pass it for the present.

The next exceptions are to the report of Edward T. Austin, master, made upon the accounts of said receiver from December, 1868, to September, 1869, inclusive. These exceptions principally relate to charges for rebatement, wharfage and drayage, interest paid for money loaned, certain payments to Mr. Andrews for services rendered, certain incidental expenses relating to the receiver's accounts, and the allowance to be made to him for his services as receiver.

I have carefully examined these exceptions with the master's report and the evidence taken by him, and I concur generally in the results to which he has arrived. Upon the additional evidence taken before him he disallows the exceptions to the payment of interest for money loaned, and I concur in this result. Several accounts have been suspended by him for further direction from the court. These are:

*First.* The charges for moneys paid by way of rebatement on freight. These charges will be allowed, for the reasons before stated.

*Second.* The receiver's expenses, and counsel and witness fees for defending himself against the motion for his removal. These charges amount in the aggregate to \$2,902.85. If the receiver gave no occasion for that motion, he was put to un-

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necessary expense and ought to be reimbursed, either out of the money in his hands or by the defendants who made the motion. The trust fund as well as the receiver, ought not to suffer for an unreasonable and causeless application on the part of the defendants. But was the application of that character? Had the defendants no ground whatever for making the motion they did?

Without at this point deciding upon the receiver's faithfulness or unfaithfulness to his trust, it is evident from an inspection of the reports, both of Master Waul and Master Austin, that the accounts of the receiver were all along so complicated and unintelligible, that no satisfactory conclusion could be formed therefrom as to the condition of the trust, or the relative state of the accounts as between the Galveston, Houston & Henderson Railroad Company, and the other parties in interest; of this want of certainty, this confusion of the various accounts, this vagueness as to the condition of the trust, the defendants constantly and repeatedly complained before the masters, until at last Master Austin refused to pass the receiver's accounts until they were rendered in a form calculated to give the information desired, as required by the original order. After this was done a much more satisfactory exhibit was presented. But this was after the application for removal had been made.

I cannot say that the demands of the defendants for a more specific statement of the accounts were unreasonable; nor that the difficulties which they experienced in getting at an explanation of the various items were not calculated, in connection with other things, to raise suspicion as to the faithful management of the receivership. I think that these circumstances are sufficient to exonerate the defendants from the burden of paying the costs and expenses incurred by the receiver. Are they sufficient to cast the burden on the receiver himself? If the receiver acted in good faith, and was ever ready as far as he was able, to make any explanations that were personally required, but was unskillful in the manner of keeping his accounts, he ought not for that cause to be visited with a pen-

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alty. It is not every good business man, or engineer, or superintendent, that understands bookkeeping. It requires a peculiar aptitude to state and keep accounts with clearness and accuracy, especially where the transactions are varied, extensive and complicated. I should not feel disposed, therefore, to cast the burden of the expenses referred to on the receiver, personally, unless satisfied that his method of keeping his accounts was adopted for the purpose of producing confusion and covering up the nature of his transactions. I do not see any sufficient evidence that this was the case. On the contrary it seems to have been the endeavor of the receiver to keep regular books and a constant record of his transactions; and for this purpose he has employed competent clerical assistance. But the intrinsic difficulties of the case may well afford some excuse for a defective exhibition of all the aspects of the various receipts and expenditures. If I were satisfied that the receiver was unfaithful to his trust, and did not, according to the best of his ability and understanding, perform the duties thereof, I should feel that I ought to cast the burden of these expenses on him. For that would have furnished good ground for his removal. But I cannot say, from anything which has been developed in the case, that he has not acted with entire integrity of purpose. Some things are undoubtedly susceptible of just criticism. I refer particularly to his acquiescence in paying out of his own anticipated allowance a stipulated sum to the counsel of the complainants. But it must be remembered that he was in the habit of frequently consulting that counsel and taking his advice and direction. He had a perfect right to do this, although it would have given less cause of dissatisfaction to the defendants had he invariably sought the advice of some attorney entirely disconnected with any of the parties to the suit. On the whole I do not consider the circumstances of these payments to counsel injudicious, as it may have been for the receiver to have thus exposed himself to unfavorable criticism, as indicative in him of any want of fidelity to his trust, or of integrity of purpose. It was undoubtedly a mistake so far as it regarded his relative position towards the

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different parties in the cause; and was calculated to awaken suspicions, and to destroy confidence in his administration. But being done on his own responsibility, and not charged to the trust, it was not necessarily inconsistent with entire rectitude of intention, as it regards the administration of the trust fund. Besides, this was not one of the grounds on which it was sought to remove the receiver, not having been known to the defendants at the time, and did not therefore enter into the considerations upon which any of the parties were then governed, and the receiver had certainly acted on the supposition that his allowance for services would be more than sufficient to cover any advances thus made by him.

I am disposed, therefore, on the whole, to allow the receiver's expenses in this behalf; and more especially in view of the fact that the charges against him were, by an amicable arrangement, withdrawn, and he thereupon voluntarily surrendered his charge to the court, rather than continue therein to the evident dissatisfaction of one class of the parties interested.

This claim will, therefore, be allowed.

The only other matter suspended by the master was the question of compensation for the receiver's services.

This will be the next in order for consideration.

**IN THE MATTER OF COMPENSATION TO BE ALLOWED THE RECEIVER.**—The question of allowance to the receiver for his services is one that properly belongs to the master's office, and not to the court.

In this case especially, the local knowledge possessed by the master with regard to the business habits and compensation for business and professional services in this community would have rendered a decision by him peculiarly valuable. But as it seems to be the desire of the parties that this matter should be decided by the court, and as the order made by Justice SWAYNE seems to contemplate such a course, the court will endeavor to discharge the duty as well as the means it has before it for arriving at a proper conclusion will admit.

In the first place it is claimed on the part of the receiver that

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this question is concluded by the report of the first master, Hughes, and the acquiescence of the defendants. I do not so regard it. It is sufficient to say that, by the subsequent decision of the court, reserving the further consideration of the subject, and requiring evidence to be taken upon it, the question is now open, if it was ever regarded as settled. But the evidence does not satisfy me that the defendants did ever acquiesce in the allowance of \$15,000 a year. The receiver probably supposed they did, or at least supposed that the decision of master Hughes was definitive, not being objected to by the defendants until so late as the 24th of March, 1868. He undoubtedly for a long time acted under that impression, and this is one reason why his payments to Mr. Hale are to be regarded as a personal matter of his own, not intended to affect the trust fund for which he was accountable. But whatever his impression may have been, neither the parties nor the court were committed to any specific allowance. For the receiver, it is insisted that the court confirmed master Hughes' report, and that this confirmation was for a long period undisturbed, so that the receiver was misled. Besides, the fact that the confirmation of a master's report on receiver's accounts is not required, and therefore has no judicial effect, it is obvious to remark that all this was for the consideration of the court upon the hearing of the exceptions to Master Hughes' supplemental report relating to the receiver's compensation, and cannot have any influence upon the question as it now stands.

By the order of Justice SWAYNE, it is made an open question, and must be decided on its merits alone.

The defendants, on their part, contend that the receiver has forfeited his title to all compensation, or, at least, to full compensation, in consequence of unfaithfulness to his trust, and complicity in alleged dishonest schemes entertained and attempted by the complainants.

Two matters have been specially referred to in support of this position. The first is, the before mentioned agreement to pay to the counsel of the complainant \$5,000 a year out of the receiver's allowance, provided the latter should not be less

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than \$15,000 a year. This point has already been considered, and my views upon it fully expressed. I do not regard it as furnishing cause for refusing to the receiver the proper compensation for his services. The other matter is the agreement entered into by the receiver with N. A. Cowdrey and others to give them twenty five per cent. of the gross earnings of the railroad for the use of the Galveston bridge proposed to be built by them after the destruction of the former bridge. It is unnecessary to go into detail for the purpose of reviewing the history of that transaction. Suffice it to say, that I have failed to discover, in the proofs, evidence to convince me that the receiver acted corruptly or in bad faith. The proposition was properly referred to the court and notice thereof given to the parties interested. A better bargain for the railroad company was effected, viz., a rent of ten per cent. of the gross earnings of the road for the use of the bridge; and there is no evidence to show that the receiver was not entirely satisfied and pleased with the result. The problem is one that might easily have led the fairest minds to quite different results. With our present knowledge of the cost of the bridge, and the amount of business commanded by the road, it is plain to see that ten per cent. is ample compensation; but at that time matters wore a different aspect. The receiver was paying 33 $\frac{1}{3}$  per cent. of the gross earnings of the railroad for transportation across the bay. The perils to which a bridge would be exposed had recently forced themselves strongly upon the public attention, and the earnings of the road at this time were averaging only about \$160,000 a year. Supposing the receiver to have been anxious for its prosperity, it would be very natural for him to seize with avidity a proposition which would result in less expense than that involved in the arrangement then existing, and would relieve the freight of the road from the delay of a troublesome transshipment, and perhaps from other embarrassments arising from the conflict of adverse interests, which are indicated in the evidence.

Regarding the receiver's conduct, therefore, in a spirit of fairness and common charity, I cannot see anything in this

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transaction which convicts him of want of integrity or good faith. It is so easy and so natural for us all, after an event has happened, to be over-wise, and to be hypercritical upon the conduct of those who were actors in the antecedent chain of transactions which led to it, that we ought to be on our guard against imputing the worst motive of which an action is susceptible. We all know how fortunes have been within our reach in the past had we but purchased property in or near growing cities at a time when the prices were depressed, and land could have been bought for a trifle. After the local improvements have been made; after the city has sprung up around us; after prices have risen; standing on the vantage ground of developed events, and looking backward at the past, we wonder at our own stupidity in not having seen the chances that lay within reach, forgetting that the light of present circumstances did not shine upon us then as it does now; that the future is ever hid from our view. This after-wisdom — this hind-sight as it has been aptly called — leads us unjustly to condemn ourselves and unjustly to condemn others, for not foreseeing events which could not be foreseen. A fair calculation of the chances may be excited into activity by keen self-interest, or keener antagonisms and competitions, which by good fortune may result in fortunate speculations.

But when the question before us is one of honesty and fairness of intention, and the acts adduced as evidence to prove the opposite consist merely of estimates and conclusions with regard to the future developments of business, we ought to hesitate a long time before we adopt a harsh conclusion.

Mr. Walker is dead. His attainments as a man of science and an engineer were of no ordinary kind. Unless compelled by the interests of justice, we ought not to lend too willing an ear to suggestions affecting his character for integrity and honesty. The proof of his deficiency in these respects ought to be clear and unmistakeable. His devotion to the interests of this road after his appointment as receiver was, I think, undoubted. He may have occasionally erred in judgment. He may have had too great deference for the views of the com-

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plainants, who represented the interests of the bondholders, probably under the not unnatural impression that, so far as the main line was concerned, theirs was the only substantial interest at stake, as the bonds, if valid, would be likely to absorb the entire property.

But it must be acknowledged that under his administration, the road was brought up from an almost hopeless condition, after the epidemic and the destruction of the bridge, in 1867, to one in which the receipts considerably exceeded the ordinary expenses ; and that a large amount of earnings, in addition to the moneys borrowed by him as receiver, were expended in the preservation and improvement of the property.

From the accounts presented to master Austin, and from other evidences in the case, it appears that \$30,310 in specie, and \$91,655 in currency, were expended by him in permanent improvements and additions to the road and its equipment, besides what was disbursed for necessary expenses and repairs. This would be equivalent to \$131,000 in currency, spent in improving the property. It is true that this was not all produced from the earnings.

The receiver obtained \$51,000 from the treasurer of the defendant's company, when he was appointed, and was indebted some \$60,000 for money borrowed and other liabilities, when he surrendered his trust. But it is in proof that a sum at least equal to the \$51,000 received from the treasurer was paid by the receiver on account of the debts of the Galveston, Houston and Henderson Railroad Company, successor. And at the time of the surrender, the road was doing a fine and increasing business.

Having come to the conclusion that the receiver was fairly entitled to compensation, the next question is, What ought that compensation to be ?

It would hardly be a proper rule for governing the case, to inquire what another even competent person would have been willing to do the work for.

The receiver's office is not put up at auction. His compensation is not fixed on that principle at all.

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The chancellor selects a person whom he regards competent and trustworthy, and the amount of compensation is graduated somewhat by the duties, and somewhat by the responsibilities of the situation. In cases of moderate amount, five per cent. on the receipts and disbursements has been allowed, which in this case would have amounted to something like \$25,000 or or \$30,000 a year. But where the amounts received and disbursed are large, it is not usual to allow a percentage, but to fix the compensation in some other manner. In one case, it is true, it was held that a receiver who discharges his duty is entitled to the usual commissions, although they appear to be more than a reasonable compensation for the services rendered; and that it was no ground for an exception to the general rules, that the business was conducted almost entirely by overseers and factors, inasumuch as the receiver had incurred the responsibility incident to these subagencies. (See *Price v. White*, 1 Baily Eq., 240; note to 2 Daniel Ch. Prac., 1435.) The information elicited by Lord LANGDALE, in *Day v. Croft*, 2 Beav., 488, quoted in Daniel's text, is useful on this head. "The masters," he says, "have each of them been good enough to furnish me with a certificate, and I find there is no general rule which universally prevails as to the allowance to a receiver, where the receipts consist of rents of freehold and leasehold estates, five per cent. upon the amount received is most frequently allowed. If there be any special difficulty in collecting the rents on account of the sums being extremely small, or of the payments being frequent, as weekly payments, then the allowance is increased; on the other hand, if there should be very great facility in receiving the rents, then less than five per cent. is allowed, etc. One master allowed four per cent. in one case; another allowed an amount equal to £300 a year at first, and afterwards £150 a year, and after that £50 a year for the same rents — the difficulty having been diminished by long leases. In conclusion, he says: "It appears, therefore, that the masters, as they ought, consider upon each occasion what is fit and proper to be allowed, having regard to the degree of difficulty or facility experienced by the receiver."

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Where a receiver is a manager as well as a mere receiver, his duties and responsibilities are largely increased ; and the management of a business like that of a railroad is one of the most difficult and responsible duties that a receiver is charged with. It requires a man of first rate qualities and attainments.

Now, we have it in proof that the railroad presidents of the country receive various sums from \$3,000 to \$20,000, a year, many of \$5,000, some of \$10,000, a few above \$10,000. Most of the defendants' witnesses think that \$5,000 a year would be ample compensation to the receiver for his services, whilst most of the witnesses called for the receiver think that \$15,000 coin is not any too much ; that he saved much more than that to the road, etc.

The receiver's income before his appointment was, by the estimation of one witness, about \$7,000 a year ; said to be of a permanent character ; all of which he was obliged to give up when he assumed the duties of the receivership ; and he himself says, that he would not have consented to take the office for less than \$15,000 a year. The previous salaries given by the defendant railroad company have been referred to as being only \$5,000 ; and sometimes not so much as that.

In view of all this evidence, of the assistance which the receiver had around him, and of the principles which the law lays down with regard to the compensation of receiver, I am inclined to think that \$10,000 in coin per annum would be a fair rate of compensation in this case. It seems to me, that \$15,000 is large, larger than what any (except two or three) of the presidents of our most important railroads in the country receive. It also seems to me that the peculiar duties, responsibilities and accountability of a receiver entitle him to a larger amount than would be demanded by the head officer of an ordinary railroad of this size and business. An allowance of \$10,000 coin per annum will, therefore, be made for the receiver Walker's compensation during the time he was such receiver. His accounts will be stated on that basis. If this allowance should bring the receiver in debt to the fund, I think the complainants in the cause should make good the deficiency to the extent of the

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moneys paid by the receiver to their counsel, as shown by the vouchers produced before me on this hearing, namely the payments made at the rate of \$5,000 per annum.

So far as the receiver chose to pay that money out of his own pocket, it was a matter for his own consideration ; but so far as he paid it out of the funds in his hands, beyond the amount which is now allowed to him, it should be returned. Therefore, any deficiency or indebtedness due from him to the fund, which may appear in making up his accounts, not exceeding the sums so paid by him to counsel as aforesaid, will be charged to the account of the present receiver, as representing the complainants.

I do not regard it necessary to make any other order in reference to those payments.

**IN THE MATTER OF MOTION TO DISCHARGE N. A. COWDREY, AS RECEIVER.** The next question for consideration is that of the motion to discharge the present receiver.

This motion is made upon several distinct grounds which are specified therein. These grounds all relate to his conduct since his appointment. The charges are, 1st. That he incited and joined in the effort to cause the abandonment and destruction of the line and track of the Galveston and Houston Junction Railway Company, thereby violating his duties as receiver. This is attempted to be proved, by showing that the receiver has privately incited the town council of Houston to pass an ordinance or ordinances for stopping the use of the Junction railroad bridge at Houston, in which the defendants claim to be interested and for abating it as a nuisance, and to give a right of way for another route through the town ; and by showing that he is engaged in furthering a new connection with the Houston and Texas Central Railroad through the town, in continuation of the old track of the Galveston, Houston and Henderson Railroad, and to the abandonment of the Junction Railroad ; and that he has actually applied to the court for leave to procure such new connection ; all this is complained of by the defendants as bad faith on the part of the receiver ; as a

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breach of trust; as treachery towards the interests, which, by his appointment and by the terms of his bond, he was bound to protect. Now, in the first place, it is not proved to my satisfaction that the receiver did incite the town council to pass the hostile ordinances referred to; as to the part taken by him in the amended ordinance, by which the city gave the right of way to build a new road through the town, and in making application to the court on the subject of such connection, I see nothing that renders him obnoxious to the severe censures which the defendants have passed upon his conduct. He has not proposed to do anything definitive on the subject, without the leave and order of the court, to be made after due notice to the defendants.

This is a sufficient answer to the whole charge. Should the court deem it for the interest of the trust to allow the receiver to send his trains through the town of Houston instead of over the Junction road, I know of no reason why the court should not make an order to that end. There seems to be no contract by which the Galveston, Houston and Henderson Railroad Company is bound to send its freight or passengers over the Junction Railroad *at all events*; and if the two interests should ultimately be adjudged distinct, as they have already been adjudged, it is hardly to be supposed that the parties owning the Galveston, Houston and Henderson Railroad will rest content to be dependent on the Junction road for a connection with the Central Railroad, if they can help it, without some favorable and permanent contract in reference to the terms of that connection.

Other reasons have been suggested by the receiver why a new outlet and connection would be desirable, such as the destruction of the bridge, etc., which it is unnecessary to refer to. In any view of the case I cannot see how it can constitute a crime on the part of the receiver, in view of the possibility of such a severance as I have adverted to, to lay before the court the facts of the case, and the terms on which a new connection can be had; especially so long as he submits himself to the orders and direction of the court. Nor can I regard the order

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by which the receiver was appointed as constituting or raising, by implication, any such agreement, to use the Junction road and nothing else, by way of connection with the Houston and Texas Central Railroad, as to make it a matter of dishonesty or bad faith to apply to the court for leave to provide an alternative connection by another route. If the defendants think that such leave would be injurious to them, and would not be a fair thing to do at this time, it is competent for them to appear before the court and say so; and it is to be presumed that the court will see that no injustice is done. And in judging of the receiver's conduct it must be remembered, as has been properly said, that he is a complainant as well as receiver, and has rights as a complainant which he is not bound to ignore and forget in any applications to the court which he chooses to make. And, in this connection, it is proper to remark that the whole transaction, which took place before Justice SWAYNE on the 19th of August, 1869, by which the defendants agreed that the complainants, on giving security to the amount of \$350,000, should have the possession and management of the property and name the receiver, places the defendants in a somewhat different attitude towards that officer from what they would be in if he were appointed by the court in the ordinary way—it certainly does not lie with them now to object to the *person* of the receiver unless he commits some overt act of unfaithfulness to his trust, which can be specified and pointed out. On this account, as well as on others, it seemed to me incompetent for the defendants to go into previous transactions of the receiver, as complainant, in order to show that he had heretofore done acts which exposed him to personal animadversion. The other grounds stated in the motion are all of the same general character with that already mentioned.

The defendants have entirely failed, it seems to me, in proving a single act of the receiver since his appointment, which shows a want of faithfulness in discharging the duties of his trust, and in view of the terms of the order under which he was appointed, I can see no reason or ground for his removal.

The motion is therefore denied.

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IN MATTER OF MOTION FOR CHANGE OF LOCATION OF ROAD. The next subject to which my attention has been directed is a motion on the part of the receiver for an order authorizing him to procure the construction of a new connecting road through the city of Houston, to connect with the Houston & Texas Central Railroad. This application was made in his report of November 19, 1869, in which he sets forth the inconveniences and dangers of the present connection, the anxiety of the city of Houston to have the present bridge removed, etc.

This cause has been appealed to the supreme court of the United States, and it is expected that it will be reached for argument in January next. It is desirable that it should be disposed of at as early a day as possible, and no doubt the court will give every facility for an early determination of the case, consistent with the practice of the court. The decision on that appeal will determine the rights of all the litigating parties, and will terminate many questions now undecided. In view of this expected early disposition of the main cause, it seems to me inexpedient to enter upon any new expenditures of much importance until that consummation can be reached. The desirableness of many contemplated changes and improvements will depend in great degree upon the final determination of the case. I do not feel disposed, therefore, to make any order authorizing the receiver to expend any of the trust funds for building a new road to connect with the Houston & Texas Central Railroad.

Should any other parties build such a connection, so that the track belonging to the Galveston, Houston & Henderson Railroad in the streets of Houston can be utilized and used, and should it be shown that the interest of the entire fund would be subserved by running trains over the same instead of over the Junction Railroad, it will then be time enough to consider the question. The court cannot now make any order which should direct the receiver to use such new connection, or which should guaranty to the constructors of any new road the use thereof in preference to the Junction Railroad. My impression is, that in view of all the conflicting interests represented in the

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case, it will be better to continue the present connection, at least, until the case shall be decided. Any saving made by the Galveston, Houston & Henderson Railroad by a new connection would be attended by a corresponding loss to the Junction Railroad Company, whose creditors and stockholders are looking to the court for protection, and as the rights of the parties are not yet finally determined, and it is uncertain how they will be determined, it seems to me best to keep the business *in statu quo* until the final decision shall be rendered. If it were certain that the roads would be severed by the final decree, I should deem it unjust to the bondholders to keep the Galveston, Houston & Henderson Railroad united to the Junction Railroad by force. But this is not certain, and therefore it is better for the court not to take any new and radical action in the matter.

My view is the same with regard to the purchase of the bridge across Galveston Bay.

I do not think it would be right for me, sitting merely to superintend the receiver's administration of the property, to authorize any such radical change as the purchase of the Galveston Bridge, when the whole cause will be decided and the property will be in private hands so soon, who can then do with the property as they see fit.

I therefore decline to make any order on either of these applications.

As to the application for the purchase of new rolling stock, I will make an order that the receiver be authorized to purchase such new rolling stock, iron rails, machinery, etc., as in his judgment may be required for the proper transaction of the business, beyond the rolling stock, rails and machinery now in his possession and control under his appointment as receiver, and as the funds in his hands will reasonably justify. Every dollar fairly expended on the road and rolling stock will be more than reimbursed by the increased value it will give to the whole property when sold.

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## RAILROAD COMPANY VS. NEAL

1. Courts of equity will not grant relief against a judgment at law except when the injured party has had a verdict or judgment rendered against him in consequence of accident or mistake or fraud of the other party without any fault of his own, and has no remedy, or has without fault lost his remedy at law.
2. Where a motion had been made on the law side of the court to set aside a verdict and judgment and grant a new trial, and had been overruled; upon a bill in equity filed for relief against the judgment, on the ground that it was unjust, and there was a good defense, that the defendant in the case at law had been surprised on the trial, and that he did not have a full and fair hearing on the motion for a new trial in consequence of the indisposition of his counsel, this court sitting in equity refused the relief and dismissed the bill.

IN EQUITY. The cause was submitted for final decree upon the pleadings and evidence.

*Messrs. F. H. Merriman, T. N. Waul, Leslie A. Thompson and Geo. Goldthwaite*, for complainant.

*Messrs. F. M. Spencer and W. M. Stewart*, for defendant.

BRADLEY, Circuit Justice. This is a suit in equity brought for an injunction to stay proceedings on a judgment at law, obtained in this court by default, and for a trial on the merits of the case.

In ancient times, courts of equity very freely entertained jurisdiction of bills to stay proceedings at law for the purpose of giving to parties the benefit of a new trial, or the benefit of a trial where none had been had, when it appeared that injustice would be done if the relief prayed for were not granted. Such bills were called bills for new trial. This jurisdiction was assumed principally on the ground that there was no remedy at law. For, until the middle of the seventeenth century, the courts of law did not grant new trials for matter *dehors* the record. Since that period, however, they have gradually assumed jurisdiction of such cases, and for nearly a century past, have granted new trials and opened judgments in all cases where justice required, and where they were not restrained by some

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statutory or technical rule. The establishment of a legal remedy has led to the disuse of the equitable one, except in cases of a peculiarly equitable character, as where the injured party has had a verdict or judgment rendered against him in consequence of accident or mistake or fraud of the other party, without any fault of his own and has no remedy, or has without his fault lost his remedy at law. This restriction of the equitable remedy has obtained in England and most of the American states; although the more liberal relief is still accorded in Kentucky, and perhaps one or two other exceptional jurisdictions. The courts of the United States, however, adhere to the rule adopted in England and in most of the equity courts of this country.

Mr. Justice STORY, in his Commentaries on Equity Jurisprudence, sec. 887, thus describes the jurisdiction as at present exercised: "In regard to injunctions after a judgment at law," says he, "it may be stated, as a general principle, that any facts which prove it to be against conscience to execute such judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will authorize a court of equity to interfere by injunction to restrain the adverse party from availing himself of such judgment. Bills of this sort are usually called bills for a new trial." In subsequent sections he states more fully some of the qualifications under which relief will, in any case, be granted. Thus: Equity will not interfere upon a defense equally available at law. § 894. Nor upon a defense which has been fully tried at law. *Id.* Nor if the complainant himself has been guilty of laches in bringing forward his defense. § 895. Nor where he has neglected to apply for a new trial within the time appointed by the rules of the proper court of law. *Id.*

A case came before Lord REDESDALE, in which a verdict had been rendered against the plaintiff, and he had applied for a new trial, which was refused for defect of notice of the motion; and thereupon the plaintiff filed a bill in equity. Lord REDES-

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DALE said that if the party had not brought evidence which was in his power, or had neglected to apply in time for a new trial, he could not interfere. "I do not know," said his lordship, "that equity ever does interfere to grant a trial of a matter which has already been discussed in a court of law, a matter capable of being discussed there, and over which the court of law had full jurisdiction." *Bateman v. Willoe*, 1 Schoales & Leffroy, 201.

Chancellor KENT, in a case where a court of law had refused to set off one judgment against another, refused to entertain a bill for that purpose, saying, "The plaintiff elected to seek relief in the mayor's court, upon the very point now raised by the bill. He had his choice whether to apply to that court or to this in the first instance. It is *res adjudicata*." Again: "The settled doctrine of the court of chancery is, not to relieve against a judgment at law on the ground of its being contrary to equity, unless the defendant below was ignorant of the fact in question pending the suit, or it could not have been received as a defense." *Simpson v. Hart*, 1 Johns. Ch., 91.

The principles announced by these eminent jurists have been expressly adopted by the supreme court. In the case of *Hendrickson v. Hinckley*, 17 How., 445, the court say: "A court of equity does not interfere with judgments at law, unless the complainant has an equitable defense of which he could not avail himself at law, because it did not amount to a legal defense, or had a good defense at law, which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents."

These principles will enable us to decide the case before us without much difficulty. It is undoubtedly a case of hardship, and requires on the part of the court a firm adherence to the principles there propounded, in order not to be led astray.

It quite clearly appears, that the defendant, having sustained an injury by a fall from one of the complainants' cars, went voluntarily to the complainants' office, and whilst claiming from them nothing by way of damages as a matter of right, asked for a donation to enable him to get to a hospital,

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and on receiving \$50, signed a receipt in full of all claims and demands against the complainants, which they still hold. Immediately after this he sued the complainants in the state district court, and laid his damages at \$15,000. Discontinuing this suit, he brought another suit in this court for \$50,000, and for default of a plea, obtained judgment and an inquest of damages to the amount of \$22,000. The complainants allege that the judgment was rendered against them in consequence of a misapprehension and a mistake on the part of their counsel, and was a complete surprise upon them after they had taken every reasonable precaution for putting in their defense. If this is true (and the proofs serve to establish its truth), the complainants ought undoubtedly to have had a trial, and a suspension or opening of the judgment for that purpose.

But this ground for suspending or opening the judgment and awarding a trial was one of which the complainants could have availed themselves by motion, on the law side of the court where the action was brought and the judgment was rendered. And the court ought not to entertain a bill in equity where there was a full and adequate remedy at law. Had the complainants lost their remedy at law by lapse of time, or otherwise without their fault; for example, had the original mistake or misapprehension continued without notice of the judgment until the expiration of the term; or, had the defendant or his attorney, by his conduct, misled the complainants until the time for making a motion had passed; then the want of a remedy at law would have furnished the court good ground for entertaining a bill in equity. But so far from this being the case, the complainants (or their attorneys) not only became aware of the judgment almost immediately after it was rendered, and during the same term, but on the second day thereafter, to wit., on the 17th of July, 1869, actually entered a motion to open the judgment and award a trial. This motion was heard on affidavits on the 24th of the same month, and substantially the same grounds were urged in favor of the application as are now urged on this hearing, namely, the existence of a good defense, of which the complainants had written evidence, signed by the defendant

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himself, and their being prevented from making said defense by the misapprehension and mistake of the complainants' counsel. The court, after full argument, denied the motion. If I should now hear the case again on this bill in equity, it would be, in effect, to entertain an appeal from that decision, a thing entirely inadmissible.

It is said that the receipt itself was not exhibited to the court, although its existence was proved and relied on; and that the complainants were surprised by the defendant's denying its existence, and by the decision of the court in relation thereto. All this may be true, but is not to the purpose. Having presented the issue, it was the duty of the complainants to prove it to the satisfaction of the court, or accept the consequences.

It is also said that the complainants did not have a full and fair hearing on the motion, because of the indisposition of their counsel. A postponement of the hearing for this cause, had it been applied for and warranted by the facts, would undoubtedly have been ordered by the court; but, at all events, it was a matter within the exclusive cognizance and discretion of the court sitting as a court of law on that hearing, and cannot be laid as the ground of a decree on this bill.

The sympathies of the court, if proper to be indulged, might lead it to afford the complainants relief if it could be done without violating those necessary rules which have been prescribed by public policy for the purpose of setting a limit to litigation. But it is "a common maxim that courts of equity, as well as courts of law, require due and reasonable diligence from all parties in suits, and that it is sound policy to suppress multiplicity of suits." Story's Eq., § 896.

In the language of Lord REDESDALE, in the case already cited; "It is not sufficient to show that injustice has been done, but that it has been done under circumstances which authorize the court to interfere. Because, if a matter has been already investigated in a court of justice, according to the common and ordinary rules of investigation, a court of equity cannot take on itself to enter into it again. Rules are established,

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The Tybee.

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some by the legislature, some by the courts themselves, for the purpose of putting an end to litigation." *Bateman v. Willoe, supra.*

It is suggested by the complainants' counsel, however, that this is not to be regarded as a suit in equity, but simply as a petition for a new trial, addressed to the law side of the court. To take this view, it seems to me, we must confound all distinctions of procedure. In the first place, the whole form of the proceeding is that of a suit in equity, and it has been treated as such by the parties. And, in the next place, a petition for a new trial being, in effect, nothing but a motion for a new trial, will not be entertained or heard after a similar motion has already been made and decided, except upon express application to the court for that purpose. To renew a motion *ex mero motu* of the party, after it has been solemnly decided against him, would be the veriest trifling with the court.

The bill must be dismissed with costs.

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THE TYBEE.

1. A carrier's liability ceases when he has delivered the goods according to the bill of lading. In the absence of a special contract the goods are to be regarded as delivered when they are deposited upon the proper wharf at their place of destination, at a proper time, and notice given to the consignee, and he has had a reasonable time and opportunity, after notice, to remove them.
2. A usage or special custom, prevailing at a particular port and brought to the knowledge of the parties, may vary this rule.
3. When it was the known usage and custom of the agents of a ship to keep goods in their possession after being landed upon the wharf, to take care of them, to protect them in case of rain, and to put them in a warehouse after delivery hours, for which they made a charge in addition to the freight; *held*, that they were bound to use ordinary diligence in taking care of the goods as long as the same remained in their possession, and the ship was liable for damages to the goods arising from the negligence of the ship's agents.

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The Tybee.

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## AMIRALTY APPEAL.

*Messrs. F. H. Merriman and L. A. Thompson*, for libellants.*Messrs. W. P. Ballinger, T. M. Jack and M. F. Mott*, for claimants.

BRADLEY, Circuit Justice. On the 22d of August, 1868, a case of dry goods was shipped at New York by Cochran & Co., on board the steamer Tybee bound for the port of Galveston, consigned to the libellants at the latter place. The bill of lading states that the package was in good order and well conditioned, and then states that the same "is to be delivered in like good order and condition at the aforesaid port of Galveston, the dangers of the seas, etc., excepted, unto Burkhardt & Shaper, or to their assigns, they paying freight for the said shipment, 40 cents per foot, with 5 per cent. primage, etc." The bill of lading then contains the following agreement: "It is expressly understood, that the articles named in this bill of lading shall be at the risk of the owner, shipper or consignee thereof, as soon as delivered from the tackles of the steamer at her port of destination; and they shall be received by the consignee thereof, package by package as so delivered; and if not taken away the same day by him, they may (at the option of the steamer's agents) be sent to store, or permitted to lay where landed, at the expense and risk of the aforesaid owner, shipper or consignee." Besides this special contract, on which the respondents relied, evidence was given by them of a usage at the port of Galveston, by which, if goods were not taken from the wharf by the consignee by 4 o'clock, P. M., the ship's agents put them into a warehouse (generally belonging to third parties), and charged the goods for the trouble of such removal in addition to the freight thereon; and also, in case of rain, covered them with tarpaulin or other covering, or removed them into a warehouse or under a shed for shelter and protection.

In this case the steamer arrived at Galveston on the 1st of September, and on the same day published in the newspaper notice to consignees of her arrival, and that she was discharg-

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The Tybee.

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ing cargo at New Wharf. The notice contained this clause, that "all goods remaining on the wharf after 4 o'clock, P. M., will be stored at the risk and expense of the consignees." It is proved that the libellants saw this notice on the day of its publication; and that they had previously received a copy of the bill of lading from New York.

It further appears by the weight of the evidence, as it seems to me, that the case of goods in question was discharged from the vessel upon the wharf on the morning of the 2d of September, and whilst lying there in a pile with other goods, a severe shower of rain came up, and the goods got wet and were damaged to the amount of \$180.30. The ship's people, it is true, covered the goods with sails and tarpaulins; but from the defective character of the covering used, the damage was not averted. They endeavored to obtain a lodgment for them in an adjoining warehouse, but from some misunderstanding with the superintendent did not succeed. After the shower was over, the difficulty being removed, but at what precise time does not appear, the goods were put into the warehouse. The ship's agent testified that it was not their habit to do this till after 4 o'clock. On this occasion, in consequence of the difficulty which had occurred, and the injury the goods received, he directed them to be put into the warehouse without expense to the owners.

The libellants did not send for their goods till afternoon—the clerk says, between 3 and 4 o'clock. They were then shut up in the warehouse, and the delivery clerk refused to open it that day, as the different packages were all mingled together. The next day they sent for the goods and obtained them, but did not open them until the 4th, when they discovered the damage which they had sustained.

Under this state of facts the respondents claim exemption from liability for the damage complained of.

The carrier's liability ceases, of course, when he has delivered the goods according to the bill of lading. The general rule with regard to delivery, as laid down in the books is, that in the absence of a special contract the goods are to be regarded

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The Tybee.

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as delivered, so far as the carrier's responsibility is concerned, when they are deposited on the proper wharf, at their place of destination, at a proper time, and notice has been given to the consignee. A usage or special custom prevailing at a particular place, and brought to the knowledge of the parties, may vary this rule. *The Richmond*, 1 Bissel, 49, and note, p. 56. Some cases qualify the rule as thus stated, by adding that the consignee must have reasonable time and opportunity to take and remove his goods before the carrier's liability is ended. Understanding this to mean, reasonable time after receiving notice of the arrival of the goods, it is undoubtedly correct.

In this case there is no question about sufficient notice having been given. The consignee was aware on the first of September, that the cargo of the Tybee was discharging, or ready for discharge. He had sufficient notice to be prepared to receive the goods on the morning of the 2d, when they were discharged on the wharf, before the shower occurred.

The special contract contained in the bill of lading was a valid one, subject to the qualification that notice of the steamer's arrival and readiness to discharge should be given to the consignee, which as we have seen, was given in this case. According to that contract, the goods were at the risk of the owner immediately after touching the wharf.

But the usage of the port, and the actual practice of the ship's agents, may have imposed subsequent duties upon them outside of what is usually known as the carrier's liability. This, as we have seen, ceased by the contract when the goods were deposited on the wharf.

By the usage and practice referred to, the ship's agents do in fact keep goods in their possession after being landed on the wharf, take care of them, put them into a warehouse after delivery hours, and protect them in case of rain; and they make a separate charge for this service in addition to the freight. They are still bailees of the goods for some purpose, and although, by the terms of the contract, they might abandon them and leave them exposed on the wharf, yet that is not the usage, nor is it the practice of the respondents. Their interest,

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undoubtedly, requires that they should treat their customers with some degree of attention beyond what the terms of their contract require; and, indeed, by giving up possession of the goods, they would lose their lien for freight.

What then are the duties which their continued possession of the goods, after their contract is determined, imposes? Under the usage, it cannot be said to be entirely a gratuitous bailment. My opinion is that they are analogous to those carriers who assume the duties of a warehouseman, when their duties as carriers are discharged, and that under the circumstances of the case they are bound to use ordinary diligence in taking care of the goods as long as they remain in their possession. They would not be liable for damage which might occur without their negligence, as by a fire accidentally consuming them, or by any other accident against which they could not, by ordinary diligence provide. Then, did they use ordinary diligence in this case, or were they guilty of negligence? Why were not the goods placed in the warehouse on the approach of the shower? It is said that from some difficulty or misunderstanding, the warehouseman would not permit them to be put therein. But it must be remembered that the ship agent had advertised that he had a warehouse at his disposal in which the goods would be put after 4 o'clock, and it seems that this difficulty or misunderstanding was not such that it could not be remedied. Mr. McMahan, the ship's agent, on coming to the wharf, soon succeeded in removing it, and seemed to feel that some consideration was due to the owners of the goods which had been left out exposed to the shower; for, having ordered them into the warehouse, he directed that their storage should be without expense to the owners. Still, if the goods had been properly cared for on the wharf, no negligence could be attributed to the employés of the ship. But the captain admitted to one of the witnesses that he had not proper coverings to protect the goods; that the tarpaulins had been condemned, or something to that effect, and were insufficient.

I think, therefore, that the agents and persons in charge

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of the ship are chargeable with negligence in not sufficiently providing for the safety of the goods, whilst they chose according to the local usage, their own practice, and from motives of their own, to retain them in their possession.

Hence I shall affirm the decree of the district court, and direct that a decree be entered for the libellants for the sum of \$180.30, with costs and the costs of the district court, against the claimants and their sureties.

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MILLER VS. THE W. G. HEWES.

1. It is no defense to a libel to recover damages resulting from a collision to say that nothing could be done at the moment to prevent it, if it could have been avoided by reasonable precautions or ordinary foresight.
2. Article XIV of the sailing regulations applied.
3. When a steamer through its own fault collided with a skiff in which were the libellant and his son, whereby the son was drowned and the libellant so seriously injured as to confine him to his bed for seven weeks, and render him unfit for labor until the date of the decree and partially disable him for life, and the skiff was broken, the court allowed as damages the necessary cost of repairs to the skiff with compensation for the loss of its use while undergoing repairs, the cost of the cure of libellant, also a sum of money as compensation for his sufferings, also a sum equal to the amount of such wages as the libellant with the aid of his son could have earned up to the time of the decree, and compensation for his permanent partial disability. The latter was arrived at by the present allowance of a sum equal to the amount of such income as the ordinary labor of libellant would produce for one-third of the period of his expectation of life according to the mortality tables.

This was an Admiralty Appeal.

*Messrs. W. P. Ballinger, T. M. Jack, M. F. Mott and G. P. Finlay*, for libellant.

*Messrs. F. H. Merriman and L. A. Thompson*, for claimant.

BRADLEY, Circuit Justice. James Miller sues the steamer

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W. G. Hewes, and her master George E. Tripp, for damages in a case of collision, and the case appears to be as follows :

On the 17th of February, 1868, about one o'clock, P. M., the day being clear, the libellant, with his son, was in a skiff, used as an oyster boat, in Matagorda Bay, at Indianola, just starting out for the Big Bayou to gather oysters. The steamer W. G. Hewes was at the same time leaving her wharf at Indianola for her trip to Galveston, loaded pretty well down (her captain says about 8 1-2 feet) with the usual Texan cargo of cattle, hides, etc., and with passengers. The steamer was aground at her wharf, lying with her stern outward, and was obliged, first, to back out of her berth for some distance and then turn to the left, eastwardly, in a circular direction, until she was brought to her course, which was in a southeasterly direction. She then started on her way, in the general direction of the skiff. The wind, what little there was, had been ahead, and the skiff, it seems, was obliged to tack, but at this time she lay becalmed, from a quarter to half a mile from the wharf, and was drifting a little towards the shore. The libellant and his son, seeing the steamer starting, got their oars out to pull. The steamer, having started on her course, was now approaching the skiff at the rate of seven or eight knots an hour. The libellant, watching her, perceived, when she was about 200 yards from him, that she was making in the direction of the skiff, and fearing he would be run down, called out as loudly as he could : "For God's sake, stop the steamer, I can't get out of the way." Several passengers, on board the steamer, at the same time saw the danger the skiff was in, and the man on the lookout at her bow, or some other person there, called out to the pilot : "Stop the boat, there's a little boat right ahead." A voice, from the pilot house, answered : "D—n the little boat." The bell, however, was rung, to stop the steamer, and the captain says her engine was stopped ; but her way could not be checked, and she struck the skiff. Previous to the collision, several persons called to those in the skiff to jump overboard. The boy did so, and was drowned. The libellant remained in the skiff, which was much damaged,

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and filled with water and sank. The libellant himself was so much injured by the wheel of the steamer, that he was rendered helpless. He was picked up by a boat, sent from the steamer, and handed over to another boat which had put out from shore, and was taken home. The physician who attended him, says that two ribs were broken on his right side, and all his ribs on the left side from the seventh down; and that he suffered a very severe rupture which renders a bandage necessary to keep his stomach and bowels from protruding, and which is not likely ever to be healed. The libellant suffered much pain; was confined to his bed for many weeks; and has become forever disabled from doing any hard work.

The captain of the steamer, to account for the collision, says that the steamer suddenly and unavoidably sheered to the right, and would not obey her helm. That the cause of this sheer was the low state of the water at the time — such that, with the draft the steamer had, her keel was in the mud; that it is impossible to steer a vessel under such circumstances. That this is always the case when the vessel's bottom is near the bottom of the water. That he took the route he did, on this occasion, because of the lowness of the water; if the water had not been so low, the usual route would have been on the other side of a certain wreck, which was farther from the shore and farther from the position of the skiff.

This sheer of the steamer, which the captain calls "*an abrupt and unavoidable sheer*," is the only serious excuse offered for running down the skiff, and is the substantial defense on which the respondents rely. And yet, strange to say, this ground was not alleged in the original answer, sworn to by the captain; but is set up at the present trial, by way of amendment to the answer. Besides, it is an accident which the captain of the steamer, according to his own account, had reason to expect would happen. He says, himself, that these sudden sheers, and the disobedience of the vessel to the helm, always occur when the vessel's bottom is in contact with the mud — which he, of course, knew to be the case with his steamer at the time. How then, if he knew this from his previous expe-

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rience, can he set it up as an excuse? Ought he not to have guarded against this danger when about to overtake a small and helpless vessel lying becalmed, and unable to get out of his way? It seems to me that it was his duty to have slackened his speed, so that if he could not control his vessel's course, he might have controlled her motion. The sixteenth article of the sailing regulations, adopted by congress, by act of 29th of April, 1864, has a strong bearing on this question. It is as follows: "Every steamship, when approaching another ship, so as to involve risk of collision, *shall slacken her speed*, or, if necessary, stop and reverse." (13 Stat., 58.) Certainly the approach of the steamer towards the skiff, in this case, did involve risk of collision, if, as the captain says, he had reason to expect that he could not depend on his helm to govern the course of his vessel. This made it absolutely his duty, in approaching another vessel, to avoid such a speed as would prevent him from stopping and backing in case a sudden sheer should render it necessary. The skiff was easily discernible. She was seen, not only by passengers on the steamer, but by persons on the wharf, long before the danger became imminent.

I cannot bring my mind to any other conclusion, than that the collision was caused by the fault of the steamer.

The question of damage is next to be considered. In the first place the amount of injury to the skiff required \$75 to put her in repair, besides the time she was unfit for use. I will, therefore, allow \$100 on that account. The physician's bill for attending the libellant was \$300. That will also be allowed. The libellant's injuries were very severe and he suffered much pain, being confined to his bed for seven weeks. Such suffering cannot well be estimated at a money value. I shall allow the libellant \$500 on this account. The value of his time from the period of the accident to the present, according to his statement (which is uncontradicted), would have been \$4 a day including the aid given by his son. That is what he says he made at his ordinary employment. His injuries have rendered him unable to make more than 25 to 50 cents per day; and even this pittance is produced by the aid of his little

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children. I shall allow him \$2 a day, making some allowance for sickness and slack work. For two years and three months this would amount to \$1,400. These sums, in the aggregate, amount to \$2,300.

Besides this, the libellant is entitled to compensation for being disabled for life. There is no fixed and settled rule for estimating the value of this injury. It depends on so many contingencies, that it is a thing of very difficult adjustment. A compensation based on a table of mortality would not be an accurate one, because a fixed sum of money, less than such a calculation would call for, received now, with the ability to invest and improve it at use, and also with ability to pursue some light business or trade, would enable the libellant to do better for his family, and lay up more for their use at his death than he would probably have done had he remained in health and in the pursuit of his ordinary employment. He is now forty-five years of age. The tables of mortality would indicate his expectation of life to be something near twenty-five years. Suppose he lived that period, the latter years would be feeble and inefficient. The present allowance of an aggregate sum, equal to the amount of an income such as his ordinary employment would produce for one-third of that time, would probably be more nearly equitable than the exact present value of such an income for life. Supposing, therefore, he could have annually realized, by said occupation, the sum of \$700, after having deducted the value of his son's services, this sum in eight years would amount to \$5,600, which, with the sum of \$2,300, before allowed, would make in round numbers, \$8,000 — exactly the amount decreed by the district court.

On the whole, therefore my opinion is, that the decree of that court should be affirmed, and that a decree for \$8,000, besides costs, should be entered in favor of the libellant against the steamer, her tackle, furniture, etc.

NOTE. — See *The Merrimac*, 14 Wall., 208, decided in 1871, where the United States supreme court announces substantially the same rule as that stated in the first head note of this case. REP.

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Campbell and another vs. The Railroad Company and others.

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GALVESTON, AT CHAMBERS, MARCH, 1871.

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**CAMPBELL and another vs. THE RAILROAD Co. and others.**

1. It is not necessary that all the holders of the bonds of a railroad company should be made parties to a bill of foreclosure brought by the trustees of a mortgage by which the bonds are secured.
2. Where there are trustees of successive mortgages, and the trustees of a prior mortgage file a bill to foreclose the same, all the bondholders under a subsequent mortgage need not be made parties to the suit in order to make the proceedings valid and binding on all.
3. Where the bondholders secured by a mortgage on a railroad are numerous, it is not necessary to make all of them parties to a suit, or to make any of them parties, if their trustees are parties.
4. In a case where the parties are numerous, a suit brought by or against some in behalf of all will be binding on all. The parties who are not named may intervene and make themselves actual parties, so long as the proceedings are in *feri*, and are not definitely closed by the course and practice of the court.
5. If the trustees of a mortgage on a railroad are parties to a suit, a decree rendered in the case is as binding on the bondholders secured by it, as if they had been made parties, unless they can show some fraud practiced upon, or connived at, by the trustees themselves.
6. Bondholders secured by a mortgage, if aggrieved by a decree rendered in a suit to which the trustee of the mortgage was a party, can intervene and become actual parties, and then make such application to the court for relief as is competent for parties to make in the same suit; or they may institute such other auxiliary, revisory or supplemental proceedings as a party to the suit might institute.
7. A bill of review may be conjoined with a bill for relief against a fraudulent decree.
8. Trustees named in a mortgage to secure bondholders were made parties defendant to a bill to foreclose the mortgage filed by certain of the bondholders and allowed a decree to be taken by default; *held*, that this supineness was a constructive fraud against the bondholders whom they represented; and if taken advantage of by the complainants in the suit, to the prejudice of the bondholders, the complainants became participants in the fraud.
9. Where complainants are allowed to dispense with parties on account of their numerousness, any one of whom would have the right to come in by petition, such complainants ought to proceed in the utmost fairness and good faith in procuring a final decree which is to be binding on all.

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BILL IN EQUITY. Heard on motion to dissolve injunction, which motion involved the merits of the bill.

*Messrs. Wm. M. Evarts and Wm. G. Hale*, for the motion.

*Mr. Geo. W. Parchal and Mr. Sessions*, contra.

BRADLEY, Circuit Justice. The Texas and New Orleans Railroad Company, a corporation of the state of Texas, on or about the 1st of November, 1858, executed 1,500 bonds of \$1,000 each, and to secure the payment thereof executed two several trust deeds and one mortgage of the same date. By one trust deed the company conveyed to Congreve and Lowery, trustees, 1,200 sections or square miles of the public lands to which the company would be entitled under the laws of the state on the completion of their road, the certificates for which were receivable from time to time, as portions of the road should be completed. By the other trust deed the company conveyed to the same trustees 120 sections of the same lands and so much of its free lands and city lots, etc., as would, with the 120 sections, be valued at \$600,000. The special object of this deed was to secure the payment of the interest on the bonds and a sinking fund of two per cent. during the construction of the road. By the mortgage the company conveyed and mortgaged to the same trustees the road bed, right of way, and the whole and entire line of the railroad constructed or to be constructed from the city of Houston to the Sabine river, a distance of 110 miles or thereabouts.

The mortgage had a clause declaring that whenever the company should procure from the state a certain loan of \$6,000 per mile out of the school fund (to which it would by law be entitled on performing certain conditions, and which it was declared the intention of the company to obtain), and should execute to the state its bonds therefor, said bonds should constitute a lien upon the property mortgaged prior and superior to the title and interest of the trustees, the same as if it had been imposed and taken effect prior the making of the mortgage.

The state loan thus provided for was in fact made upon about 70 miles of the road, situated east of Trinity river, to the

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amount of \$430,500, but for the portion of the line between Trinity river and Houston, being about 40 miles, and being the last part of the road which was completed, the state failed to make any loan, but in lieu thereof, for the relief of the company, enacted a law February 7, 1861, entitled "an act for the relief of the Texas and New Orleans Railroad Company," by the second section of which it was enacted that the company should have the power, and it was authorized, to issue a first mortgage upon its railroad from the west bank of the Trinity river to the city of Houston ; provided, that the company should relinquish all claims to the state loan on that section of the road. It is sufficiently proved that the road was not completed when this law was passed, and that in pursuance of it the company relinquished all claims to the state loan, and on the 18th of March, 1861, issued 480 bonds of \$500 each, being just the amount which the state loan would have been for that 40 miles of road, to wit, \$240,000, and executed to Shepherd and Hutchins, trustees, a mortgage on this part of the road and all its appurtenances. The bonds stated on their face that they were issued in lieu of the state loan, and the mortgage refers to the act of 1861, and professes to be the first mortgage on this part of the road by virtue of that act.

The bonds thus executed were issued to various parties — contractors and others — and the proof is sufficiently conclusive that they were received for value to the amount of their face, and were negotiated and received as a first lien on that portion of the railroad on which the mortgage given to secure them was laid. These bondholders claim that they are entitled to priority accordingly.

By an act of the legislature of Texas, passed in 1854, every railroad company was entitled to a donation of 16 sections of the public lands of the state for every mile of railroad completed. By this law the Texas and New Orleans Railroad Company became entitled to 1,760 sections, or thereabouts. The two trust deeds of 1858 conveyed only 1,320 sections, leaving 440 sections unincumbered. Whether these sections were embraced in the general terms of the mortgage of 1858 is,

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perhaps, a question. But it is undoubtedly true that a considerable number of land certificates were issued to various parties for value and are now outstanding, claimed to be free from the lien of any mortgage or trust deed executed by the company.

The advent of the late civil war in 1861, and the consequent losses and troubles that ensued, disabled the Texas and New Orleans Railroad Company so that it was unable to pay even the interest on its bonds. These contained a provision that if the interest should not be paid within 90 days after becoming due, the principal should be due and payable, and the trustees should be authorized to take possession of and sell the property mortgaged.

In this condition of things, January, 1868, Charles Moran, Edwin Eldridge and Charles Danforth, three of the holders of the bonds issued in 1858, residing in the states of New York and New Jersey, filed a bill in equity in this court for the foreclosure of the two trust deeds and mortgage given to secure the said bonds, claiming that these securities constituted the first lien on the road and property of the company except that of the bonds issued to the state.

They alleged in their bill that it was brought not only for their own benefit, but for that of all other holders or owners of bonds or coupons issued under and purporting to be secured by the mortgage and deeds of trust sought to be foreclosed, who might come in and contribute to the cost and expenses of the suit. They further state that Congreve, one of the trustees, refused to file a bill, and that Lowery, the other trustee, was out of the country. They therefore make these trustees defendants, being citizens of the state of New York. The other defendants to the bill were, the railroad company itself, and Shepherd and Hutchins, the trustees of the mortgage given in 1861. The giving of that mortgage, and the issuing of the bonds under it, were mentioned in the bill; but the number of the bonds issued or the persons to whom they were issued were alleged to be unknown to the complainants. The bill prayed for the appointment of a receiver, a collection of the assets, a settlement of all priorities, a sale of the road and

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land certificates and other property of the company, and a distribution of the proceeds according to equity and justice.

The Texas and New Orleans Railroad Company and the trustees, Shepherd and Hutchins, filed separate answers to the bill, in which was set up, amongst other things, the priority claimed by the holders of the bonds issued in 1861 on the western forty miles of the railroad. The answer of the company also sets up various defenses to the equity of the bill — that the bonds held by the complainants were unfairly obtained for an amount greatly less than their value, etc.

In November, 1869, before any evidence was taken by either party, an agreement was entered into by certain of the parties by virtue of which a consent decree was made on the 18th of December, 1869, by which it was found there was then due for the principal and interest on the bonds of 1858 the sum of \$2,640,600, and on the bonds of 1861, the sum of \$393,600; that the entire property of the company, present and future, was in effect subjected to a lien in favor of the bonds issued in 1858; and that the line of railroad between Houston and Liberty, with the site and lands and other property necessary to its operation, was, in effect, mortgaged and subject to a lien in favor of the bonds of 1861; also, that the company was insolvent, and the road disused and in danger of irreparable injury for want of care and proper repair; that Congreve and Lowery, the trustees of 1858, though they entered an appearance, had never answered or done anything, and a decree *pro confesso* was taken against them. It was, therefore, decreed that the defendants pay the amount found due by 1st of March then next, or be forever barred and foreclosed of all equity of redemption in the property, and that Josiah F. Crosby, of Houston, be appointed special master to make sale of the property, with direction, in case the money were not paid, to sell all the property of the company, including the entire railroad, fixtures, rolling stock, personal property, lands, land warrants, and all rights and franchises whatsoever, and that he should report his sale to the court with the name of the successful bidder, and that thereupon the court or

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judge at chambers would determine how much of the bid should be paid in cash, in order to pay the costs and expenses of litigation and management, and how much in the bonds of the company, and would also determine, if necessary, the relative priority of the two series of bonds. The decree then went on to appoint said Crosby receiver to take possession of all the property, borrow money, and execute bonds therefor which should be a first lien on the road, repair the railroad, procure rolling stock, operate the road; and, if any resistance should be made, to file an affidavit with the clerk, who was thereupon directed to issue a writ of assistance in his behalf. The decree further appointed said Crosby a special master, and Daniel W. Gillett, of New York, a special commissioner to receive proof of the genuineness of the bonds and register the same, and to certify to the court the bonds so proved and registered; and it was decreed that no other bonds should participate in the proceeds of the property to be sold, and that the books should be closed on the 1st of July, 1870.

In pursuance of this decree the receiver took immediate possession of the road and property of the company, except the land certificates (many of which have never been surrendered), and proceeded to make extensive repairs on the road and works of the company, and for this purpose borrowed money and issued his bonds to an amount exceeding, as is alleged, \$80,000, and in October last advertised the whole road and property of the company to be sold at the court house in Galveston on the 8th day of December, 1870.

Under these circumstances, the bill in this case was filed on the 30th of November, 1870.

The complainant Campbell, who was one of the original contractors for building the road, as is alleged, holds 180 land certificates, each for one section of 640 acres, received from the Texas and New Orleans Railroad Company on his contract; also 25 bonds of the issue of 1858, which, with the interest due thereon, amount to \$45,800; also 34 of the bonds of 1861, which, with the interest, amount to \$32,464, and 4,000

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shares of the capital stock of the company of the nominal value of one hundred dollars each.

The complainant French holds 60 of the bonds of 1861, which, with interest, amount to \$53,760, and by an amendment to the bill, Campbell states that he represents 316 bonds of the issue of 1861, belonging to persons who have agreed to contribute to the suit, and 40 others which he is bound to protect. So that the two complainants represent nearly all, or at least a large majority of the bonds of 1861.

The bill professes to be filed on behalf of the complainants themselves, and all creditors, bondholders, holders of land, and land scrip of the said company and emanating therefrom, as well as unsecured creditors. It makes defendants of the Texas and New Orleans Railroad Company, Shepherd and Hutchins, the trustees of the mortgage executed in 1861, Crosby, the receiver and special master appointed in the former suit, Lowery, the surviving trustee of the securities executed in 1858, and Moran, Eldridge and Danforth the complainants in the former bill.

The bill seeks to set aside the decree in the former suit on the ground of fraud in obtaining and entering the same, and because it is inequitable and unjust in ordering a sale of the whole property, in omitting to settle the priorities of the two classes of bondholders, in ignoring the rights of the holders of the bonds issued in 1861, and in making various other erroneous decisions, and seeks to have a new decree made, which shall settle said priorities; a foreclosure of the several mortgages; a sale of the property in such manner as to protect the equities of all parties under the several trusts, and, in the meantime, an injunction against the sale or any further proceedings under the former decree, and the appointment of a receiver. Excuses are given for not appearing and intervening in the former suit, such as absence, ignorance of the proceedings, reliance on the trustees, etc.

Upon the filing of the bill and due hearing before me, on the 5th of December last, I granted a preliminary injunction to stop the sale of the property.

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Separate answers have since been filed by the defendants. Shepherd and Hutchins, the trustees of the mortgage of 1861, of course answer in the interest of the complainants, and admit all the allegations of the bill. The answer of the Texas and New Orleans Railroad Company, by its president, A. M. Gentry, is to the same purport, setting forth more minutely the transactions upon which the complainants rely. Lowery, the surviving trustee of the bonds of 1858, admits the main facts, but submits the matter to the court, denying, however, that he ever authorized his appearance in the former suit. Crosby, the receiver, says that he has no private or personal interest in the matter, and he sets forth, as required, a schedule of the land certificates which have come to his hands or of which he has received any account.

The answer of Moran, Eldridge and Danforth, the complainants in the former suit (which is sworn to by Moran only), sets forth the views of the contestants in this case. They allege that the decree was entered up in the former case, not by consent, or in pursuance of the alleged agreement, but at a regular hearing of the cause, and they contend that it is not inequitable in any particular; that it does not conclude the rights of the complainants, but leaves them to be settled on further hearing, etc. They admit the execution of the agreement in November, 1869, as stated by the bill, and that it was not carried out; but they allege that the failure to carry it out was the fault of the company and its officers in not complying with the terms of the agreement.

Testimony was taken on short notice with a view to a speedy termination of the cause, on final hearing, and the complainants proffer themselves ready for such hearing. The defendants say they are not ready, but move to dissolve the injunction.

In view of the stipulations made by the parties, looking to a speedy hearing on the merits, and of the terms on which the preliminary injunction was granted, which were that the complainants should give bond to indemnify the defendants against all damage that might be caused by the injunction if it should be dissolved upon the merits, I think it fair and right that the

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hearing of this motion to dissolve should be upon the merits, and that the complainants should have leave to refer to all the evidence taken in the case.

The first question raised by the defendants is the propriety of this suit. It is brought to set aside a former decree of this court and to obtain a new decree on the same subject matter, having in general the same end in view, namely, the foreclosure of the mortgage and sale of the property of the Texas and New Orleans Railroad Company to pay the incumbrances thereon. The first suit was brought by bondholders for themselves and all others interested. This suit is brought by other bondholders not parties to the first suit, for themselves and all others interested. The present suit seeks to set aside the decree in the former and to have a new decree on the same matters. At first sight this seems to be an anomalous proceeding.

The query at once arises, Will not such a practice lead to endless litigation? What are the principles by which we are to be guided in such cases? It seems to me on reflection, that we need not be at any great loss to discover a solution of the difficulty. The first suit was or was not defective for want of proper parties. Are all the bondholders of a railroad company necessary parties to a bill of foreclosure, brought by the trustees of the mortgage by which the bonds are secured? Or, where there are successive mortgages, and the trustees of a prior mortgage file a bill to foreclose the same, must all the bondholders under a subsequent mortgage be made parties to the suit in order to make the proceedings valid and binding on all? It seems to me impossible to contend for the affirmative. The rule of chancery pleading which allows some parties to sue or to be sued in behalf of all, where their right is the same and the number is so large as to render it difficult to bring them all before the court, must certainly apply to this case. The very fact that trustees are interposed to receive and hold the mortgage given to secure an issue of bonds, sometimes amounting to hundreds and thousands and transferable by delivery, shows that it is the intent and understanding of all parties, unless the contrary appears, that the trustees are to

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represent the bondholders in all matters of litigation respecting their common and general rights; and if the trustees fail or refuse to act, any of the bondholders, for themselves and in behalf of the rest, may step forward and put in motion the machinery of the law, making the trustees parties defendant. In my judgment it is not necessary, where the bondholders secured by a railroad mortgage are numerous (as in the case of an issue of several hundred bonds, they will be presumed to be), to make all of them parties to a suit, or to make any of them parties if their trustees are parties. This I regard as the proper general rule, growing out of, and being merely an application of the more general rule, that where parties are exceedingly numerous, and it would be impracticable to join them all without almost interminable delays, and other inconveniences which would obstruct and perhaps defeat the purposes of justice, it is not necessary that they should all be made parties to a suit in equity; but a suit brought by or against some in the behalf of all, will be binding on all. (Story's Equity Pleadings, § 94 *et seq.*) In such cases the parties who are not named may come in under the decree and take the benefit of it, or show it to be erroneous, or entitle themselves to a rehearing. In other words, they may intervene and make themselves actual parties, so long as the proceedings are in *feri*, and are not definitely closed by the course and practice of the court. (Story's Eq. Plead., § 96.) In view of this rule, the former suit, brought by Moran and others, was properly framed to obtain a valid and binding decree against all the parties whose interests are now before the court. The complainants in the present suit, holders of bonds issued in 1861, were not personally before the court, it is true; but their trustees, Shepherd and Hutchins were parties, and their interest was thus properly represented; and the decree rendered in the case was as binding on the bondholders as if they had been made parties, unless they can show some fraud practiced upon or connived at by the trustees themselves. The bondholders, if not parties to the suit, were *quasi* parties, and had the right at any time to intervene and become actual parties.

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The present suit, therefore, must be regarded as a suit brought by those who were *quasi* parties or privies to the former suit, and who, as such, were bound by the decree rendered therein, unless they can show some ground for setting aside the decree which could be set up by an actual party to the suit.

It is clear, therefore, that the complainants have no right to commence an independent and original suit to foreclose the mortgages of the railroad company. They can only intervene and become actual parties to the former suit, and then make such application to the court for relief as it is competent for parties to make in the same suit; or they may institute such other auxiliary revisory, or supplemental proceedings as a party to the suit might institute. Does the present suit belong to that category?

I am clearly of opinion that it does. It is in essence and effect nothing but a bill of review, conjoined with a bill for relief against a fraudulent decree. These are bills competent for a party in a suit to file, and if both causes are alleged to exist, they may be joined in one bill.

A technical observance of the rules of practice would have required a motion for leave to file a bill of review; but this motion is not necessary for filing a bill grounded on fraud in the decree. But as no objection of this kind has been made, it is unnecessary to consider it.

My conclusion, therefore, is, that the suit is properly brought. The next question is, Whether the bill and evidence show any good ground for the relief asked? It is contended, I. That the decree sought to be set aside was fraudulently obtained; and II. That it was, at all events, erroneous and inequitable.

I. Do the bill and evidence show that the decree was fraudulently obtained? The bill alleges that it was a consent decree, entered in pursuance of an agreement executed shortly previous. A copy of this agreement is annexed to the bill. It was signed on one side by the principal holders of the bond of 1858, whose interests were represented by the bill of complaint, including Moran, one of the complainants, and Congreve, one of the trustees; and on the other side by the president and vice-

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president of the railroad company. It was not signed by the trustees, Shepherd and Hutchins, and in their answer they allege that they knew nothing about it, but considered that they were formal parties, and that the real parties in interest would watch the proceedings, and assert and contest their priorities. From this it is evident, that so far as the trustees were concerned, they cannot claim that any fraud was practiced on them. They allowed the decree to be taken by default. But this supineness in the matter was really a constructive fraud against the bondholders whom they represented; and if knowingly taken advantage of by the complainants in that suit to the prejudice of the bondholders, they are participants in the fraud. And the present complainants allege that they relied on the agreement being carried out in good faith.

This brings us to the question whether the conduct of the complainants (or those whose interests they represent) in relation to entering up a decree, after making that agreement with the agents of the company, was or was not, characterized by good faith, and free from any just censure. If it was, then the decree cannot be called in question by these complainants; if it was not, the complainants may justly say to them, you took advantage of the gross negligence of our trustees (whom alone you made parties) in not looking after our interests, and you also took advantage of the officers of the company upon whose vigilance we had next a right to rely.

Where complainants are allowed to dispense with parties on account of their numerousness, any one of whom would have a right to come in by petition and be made a party, if necessary to protect their interests, they ought to proceed with the utmost fairness and good faith, and not resort to anything like sharp practice in procuring a final decree, which is to be binding on all. Any deviation from this requirement would be a proper ground to be considered on the question of opening or setting aside the decree at the instance of such an omitted party. The court would not tolerate any conduct of the complainants calculated to lull such parties into security and in-

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duce them to remit any degree of watchfulness in regard to their interest which they would have otherwise exerted.

The defendants, Moran and others, say in their answer in this suit, that the decree in the former suit was not entered in pursuance of the alleged agreement, and was not a consent decree.

But the evidence of Mr. Thompson and others is against them on this point, and the very first article of the agreement is, that an agreed decree be entered in the foreclosure suit now pending, directing the sale at public auction of said railroad, its property and franchises. This article, taken in connection with the fact that the decree was signed and entered at the first opportunity after the agreement was executed, and with the evidence on the point, the inference is irresistible, that the decree was signed and entered in pursuance of the agreement, and was a consent decree. This renders it necessary for me to look at this agreement, and endeavor to determine whether there is a reasonable show of evidence to sustain the allegations of the bill, that the complainants in the former case, after getting possession of their decree, fraudulently evaded the performance of the other stipulations of the agreement.

After the first article relating to the entry of a decree, as aforesaid, the agreement went on to lay down a scheme for reconstructing the company and setting the road in motion. A committee, consisting of Moran and others, was appointed to buy in the road and organize a new company, which was to issue bonds to the amount of \$2,700,000, of which \$500,000 preferred was to be used for repairs and equipments of the road, and \$2,200,000 to be distributed among the holders of the land grant bonds, including \$600,000 due the state. The new company was then to issue \$1,650,000 preferred 7 per cent. stock, of which \$1,250,000 was to be used to pay interest coupons due, and \$400,000 to pay the bonds of 1861. Provision was then made for the proportions in which the different parties were to advance money. Moran, before signing the paper, prescribed as a condition that the land warrants for the

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land, covered by the land grant mortgage, should be duly handed over to the receiver when appointed.

Now, it is not pretended that these portions of the agreement have been carried out, but it is in evidence that on the 26th day of July, 1870, at a meeting of the holders of the bonds of 1858, in New York, at which Congreve and Moran were present (1,273 bonds out of 1,500 being represented), it was formally resolved "that the agreement heretofore made with the old officers of the company be considered as void, owing to the failure on the part of the company and its officers to turn over the land certificates and other property in their possession, as stipulated in said agreement, thereby rendering all attempt to reorganize under that agreement utterly useless."

Now, if the excuse here alleged for not carrying out the agreement was not the true one; if it was a mere pretense; and if, having got the decree, the complainants in that suit who represented these bondholders, resorted to various shifts and expedients to avoid carrying out the remainder of the agreement, they would certainly have been chargeable with bad faith, and the complainants in this case, who were directly interested in that agreement, would have a just right to complain, and would be entitled to a reversal of the decree and a rehearing upon the merits. This is just the issue which the complainants in the present bill have made, and they have adduced considerable evidence to prove their side of it. If the case were now on final hearing, I should feel it my duty to carefully examine and weigh this evidence as well as that which is offered on the other side to rebut it. But the defendants decline to go into the final hearing at this stage, and aver that they have further proofs to take. This being the position of the case, I think I ought not to dissolve the injunction until the final hearing can be had.

II. But as to the propriety of the decree itself, I am further of opinion, that in any aspect of the case, the demand of the complainants for a settlement of the priorities of the two classes of bonds, before a sale of the property is made, is reasonable.

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For if the bonds of 1861 should be adjudged to have priority over those of 1858, on the 40 miles of road between Houston and Liberty, then it would be a matter of grave consideration whether the court ought not to decree a separate sale of that portion of the road. It is true the release of the state's claim on that portion by the act of 1861 would place those bonds on an equality with those held by the state, and they might share the proceeds of the whole road pro rata with the state. But it does not appear that the seventy miles of road east of Trinity river, on which the state retained its lien, is equally valuable pro rata per mile with the forty miles west of that river; and then the decree and the notice of the special master under it, both seem to contemplate a sale of all the company's property in lump, including lands and land certificates as well as railroad; and in these neither the state nor the holders of the bonds of 1861 have any interest. So that the decree seems to be irremediably defective. And I cannot see how any evidence, yet to be adduced, can obviate this difficulty, unless it be directed to the primary question of priority between the parties. Though how that question can be materially changed by further proof *aliunde*, I can hardly imagine.

It is unnecessary for me to examine several other questions presented by the bill, as for example, the title of the holders of the bonds of 1858 to the full amount of principal and interest due thereon. This is a question that can hardly be mooted on a bill of review. Besides, I do not see anything alleged or proven in the case, that goes to show that the holders are not entitled to the entire amount of the bonds. The sale of bonds pledged as collateral, on default of payment of the principal debt, is such a common transaction that it will need specific evidence of fraud to throw suspicion on the title of the purchaser.

Nor need I now decide in what manner the receiver shall be reimbursed the expenses made by him in restoring the road to working order and operating it. Being an officer of this court, of course he will be entitled to be protected, and, in some way his expenditures must be paid out of the general proceeds of

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Assignee of Wicks & Co. vs. Perkins.

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the company's property; but in what proportion out of different portions thereof, it is not necessary now to determine.

Nor do I regard it as necessary to appoint a new receiver. No complaint is made affecting the capacity or fairness of the present receiver.

I take it for granted that the parties are still desirous of bringing the case to a hearing at the earliest possible moment, and that without any unnecessary delay, the whole matter will be disposed of as equity shall require.

The motion for dissolving the injunction must be denied.

NOTE. The opinion of Justice Bradley upon the final hearing of this cause will appear in volume 2 of these reports.

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GALVESTON, MAY TERM, 1871.

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ASSIGNEE OF WICKS & CO. VS. PERKINS.

The lien of a mortgage creditor on the real property of a bankrupt is not lost by his failure to prove his debt, so that after the end of the proceedings in bankruptcy, he cannot enforce his lien.

IN EQUITY. The case was submitted on exceptions to the sufficiency of a plea to the bill of complaint.

*Messrs. Peter W. Gray and W. B. Botts*, for complainant.

*Messrs. John W. Harris and Branch T. Masterson*, for defendant.

WOODS, Circuit Judge. The bill was filed on September 10, 1870, and alleges in substance, that on the first day of April, 1867, the defendant, Henry E. Perkins, being indebted to George A. Wicks & Co., in a large sum of money, made and delivered to said Wicks & Co. his four promissory notes of that date, for \$4,214.29 each, payable to their order at the Houston Insurance Company in the city of Houston, in six, twelve, eighteen and twenty-four months respectively, with eight per

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cent. interest. On the same day, in order to secure the payment of said notes, Perkins executed to Andrew J. Burke a deed of trust in the nature of a mortgage, conveying to him certain real estate in the eastern district of the state of Texas. The said deed of trust was subject to the condition, that if said Perkins should pay the notes aforesaid when they fell due, the deed should be void, otherwise the said Burke was authorized to sell at public sale the property conveyed to him by said deed, and apply the proceeds of the sale to the payment of the principal and interest due on said notes, and the surplus, if any, he was required to pay to said Perkins. The said notes were afterwards, and before maturity, transferred to complainant, together with the benefit of the security of said deed of trust.

The bill further alleges that Perkins failed to pay the notes at their maturity, and the trustee, Burke, has failed and neglected to execute the powers conferred on him by the deed of trust. Perkins still remains in possession of the said real estate, and at the December term, 1868, of the district court of the eastern district of Texas, applied for and obtained his discharge in bankruptcy; that John W. Harris, one of the defendants, claims to have purchased said real estate included in said deed of trust, at a sale thereof by the assignee in bankruptcy of said Perkins, but no valid sale of said lands was made that could in equity affect complainant's lien; no valid order or decree of the court for the sale of said lands was made so as to affect said lien; that no person authorized so to do has ever applied for such order of sale, and complainants never had notice of such proceedings as required by law, and that no lawful order for sale of said lands has ever been made by the court having jurisdiction thereof.

The bill prays that said lands may be sold disincumbered of any claim or title of said Harris, and the proceeds applied to the payment of the amount due on the notes secured by said deed of trust.

To this bill a plea is interposed which alleges in substance, that on the 23d day of December, 1868, the defendant, Perkins,

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Assignee of Wicks & Co. vs. Perkins.

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filed his petition to be adjudged a bankrupt; that on the 3d day of February, 1869, he was so adjudged; that the debt of complainants was provable in bankruptcy; that complainants had notice of the proceedings in bankruptcy before the filing of their bill of complaint, and that they neglected and failed to prove their debt in the said proceedings in bankruptcy as required by law. The case is submitted on the sufficiency of this plea.

It appears from the pleadings that Perkins, the bankrupt, received his final discharge before the filing of the bill in this case. The plea, therefore, presents the question, whether the lien of a mortgage creditor on the real estate of the bankrupt is lost by his failure to prove his debt, so that after the termination of the proceedings in bankruptcy he cannot enforce his lien.

I think this proposition must be decided in the negative. A secured creditor can resort to one of these remedies: 1. He may rely upon his security. 2. He may abandon it and prove the whole debt as unsecured, or, 3. He may be admitted only as a creditor for the balance remaining after the deduction of the value of the security. If he takes either of the two courses last named, he must of course prove his debt. But suppose he chooses to rely upon his security, there is no positive provision nor is there anything in the policy of the bankrupt law requiring proof of the debt, unless he seeks the aid of the bankrupt court to enforce his lien.

By the 20th section of the bankrupt act, the assignee may sell incumbered property of the bankrupt subject to the claim of the secured creditor thereon. This he may do without petitioning the court or without any order of the court but where he so sells, he does so subject to all lawful incumbrances, and can convey no higher or better interest. The proceeds of the sale are supposed to be the price and value of the interest so sold, with a knowledge of incumbrances.

Such a sale does not therefore affect the lien of the creditor. Is it lost by the mere fact that he does not prove his debt? I think not. He may rest on his security and enforce it at

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**King vs. The Young Men's Association.**

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any time he pleases, either before or after the end of the proceedings in bankruptcy. Of course he loses any claim against the bankrupt personally, but he still has the right to proceed against the property the lien on which the law has preserved to him.

The only objection to this view is found in the opportunity it might afford the bankrupt to shield his property from the claims of just creditors by covering it with fraudulent liens. The answer to this is that it is always in the power of the assignee, if he suspects that the property of the bankrupt has been fraudulently incumbered, to obtain an order of court to sell it free from incumbrances, and compel the lien holders to make good their claims by proof before a distribution of the proceeds of the sale.

The fact that an assignee asks for a sale of property subject to incumbrances is an admission on his part that the incumbrances are *bona fide*. On such a sale the lien of the creditor is left intact, and he can take his own time to enforce it.

After the end of the proceedings in bankruptcy, the lien creditor may apply to any court of competent jurisdiction to enforce his claim. This is what the complainants in this case have done.

The property according to the averments of the bill was sold subject to their lien, and they have not lost their lien by failing to prove their debt.

I think therefore that the matter set forth in the plea is no sufficient answer to the bill. The plea must therefore be overruled.

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GALVESTON, MAY TERM, 1872.

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**KING VS. THE YOUNG MEN'S ASSOCIATION.**

1. In Texas, a vendor's lien is not superior to or different from the ordinary lien of a mortgagee holding a mortgage given for the purchase money of the property mortgaged.

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**King vs. The Young Men's Association.**

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2. At common law, a mortgage transferred the legal title to the mortgagee, who could at any time take possession of the property and hold it until his debt was paid and the land redeemed.
3. Equity, however, gave the mortgagor the right to redeem, which could not be taken from him by anything short of judicial process or a release from himself or great lapse of time in demanding his rights.
4. In Texas, the reservation of a vendor's lien in the deed of conveyance is equivalent to a mortgage taken for the purchase money contemporaneously with the deed. The purchaser has the equity of redemption precisely as if he had received a deed and given a mortgage for the purchase money, and he has the right to redeem.
5. If the purchaser has sold the land to a third person, and the deed has been duly recorded or made known to the original vendor holding a vendor's lien, the original vendor cannot turn such third person out of possession or extinguish his rights without legal process.
6. It was a general practice throughout Texas, though not required by law, to record deeds and mortgages in separate record books: *Held*, that when a deed was recorded in the book for the record of mortgages, such record was irregular, and imposed no legal or constructive notice on third persons.
7. Actual notice of a deed is quite as effectual as constructive notice based on the record of the deed.
8. Land was conveyed to a grantee, the vendor retaining a vendor's lien for a part of the purchase money. The grantee conveyed to a trustee, who took the title in trust for a joint stock company, and went into possession. The original vendor prosecuted a proceeding to foreclose his vendor's lien without making the trustee a party: *Held*, that the right of the company to redeem was not foreclosed.
9. In such a case, the proper party to file a bill to redeem would be the trustee. But where the trustee had been removed, and the directors of the company had failed to appoint a new trustee, the stockholders might file a bill to redeem.

This was a cause in equity which was submitted for final decree on the pleadings and proofs.

*Messrs. W. P. Hamblin and E. P. Turner*, for complainants.

*Messrs. Peter W. Gray and Geo. Goldthwaite*, for defendants.

BRADLEY, Circuit Justice. This bill is filed to redeem certain lands in Harris county, Texas, which were proposed as a site for a projected city, to be called New Houston. The case stated by the bill is substantially this: That on the 18th of April, 1866, John T. Brady purchased the lands in question

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*King vs. The Young Men's Association.*

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for the sum of \$29,602.50, payable, half in cash, and half in promissory notes, secured by a lien in the nature of a mortgage reserved to the vendors in the deed. That on the 27th of December, 1866, Brady conveyed the land to William P. Hamblin, as trustee for Isaac T. Tinsley and his associates who contemplated organizing a joint stock company for owning the same, and laying it out into a city. That the association was organized the same day by Tinsley, Brady and one William Brady, who chose the name of the New Houston City Company, and resolved to have a capital stock of \$1,000,000, and to issue certificates therefor in shares of \$100 each; that they issued certificates for the said capital, and that the complainants for a valuable consideration received a certificate for 100 shares of the stock, which were expressed to be convertible at the option of the owner into New Houston city lots, at their assessed value upon the books of the company, and transferable only on the books upon surrender of the certificate; that by virtue of this certificate the complainants became beneficially interested as stockholders in the company, and in all its property, particularly the said lands; that stock was thus issued to many parties in England, New York, Texas and elsewhere, many of whom were unknown to the complainants; that the company took possession by their trustee and directors and remained in possession of the lands until February, 1869, when they were sold by the sheriff of Harris county under a judgment on the purchase notes before mentioned, and purchased by the Young Men's Mutual Real Estate and Building Association; that the said suit was brought to foreclose the lien as well as to recover on the notes, but that no one but John T. Brady, the maker of the notes, and original vendee, was made a party to the suit—no officer, director or stockholder of the company being made a party, although the plaintiffs knew that the company had purchased the property, and was, by its trustees, officers and tenants in possession thereof; that the Young Men's Association took possession of, and now hold the property, and have ever since received the rents and profits thereof to an amount greater than the debt due, and that the trustee for the stock-

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holders of the New Houston City Company has resigned or been displaced, so that they have no one to represent them. They therefore pray that they and the other stockholders may be permitted to redeem the lands by the Young Men's Association, accounting for the issues and profits received, and the complainants being allowed to pay the balance of the debt, if any remains.

The defendants set up three grounds of defense:

First. That the deed to Brady of April, 1866, by reserving the vendor's lien, conveyed only an imperfect title to him, which was determined by his failure to pay the notes; whereby the vendors or their assigns, the holders of the lien, became entitled to the immediate possession of the property, by virtue of the superior and only legal title remaining in them.

Second. That the deed from Brady to Hamblin was never properly recorded, and that the vendors and holders of the notes had no notice of it; and, therefore, were not bound to make the trustee or company parties to the suit brought on the notes.

Third. That the complainants, being mere stockholders of the New Houston City Company, have no legal interest or equity of redemption which entitles them to redeem the property.

1. The first point, after considerable examination and reflection, I think is not tenable. It assumes that the vendor's lien in Texas is something superior to, and different from, the ordinary lien of a mortgagee, holding a mortgage given for the purchase money of the property mortgaged. A careful examination of the cases cited for this purpose, I think shows that this is not so. The mortgage, at common law, transferred the legal estate to the mortgagee, who could at any time take possession of the property, and hold it until his debt was paid and the land was redeemed. He could turn the mortgagor out of possession by an action of ejectment. (Story's Equity, § 1017.) Nevertheless equity gives the mortgagor a right of redemption, which cannot be taken away from him by any thing short of judicial process, or a release from himself, or great lapse of

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time in demanding his rights. In many of the American states this right of the mortgagee, by virtue of his legal estate, to take immediate possession, is modified it is true; and in nearly all of them the interest or equity of redemption of the mortgagor is regarded as a legal estate, and has all the incidents of a legal estate, though subordinate to the rights of the mortgagee, for the purpose of collecting the mortgage debt. But in all the states, a mortgagee in possession, after the debt is due, cannot be ousted by the mortgagor without redemption of the property by paying the debt.

Now, in Texas, I understand the law to be precisely the same. The reservation of the vendor's lien in the deed of conveyance is equal to a mortgage taken for the purchase money, contemporaneously with the deed, and nothing more. The purchaser has the equity of redemption precisely as if he had received a deed and given a mortgage for the purchase money. If the debt becomes due and he fails to pay it, the vendor may, by the peculiar forms of action which exist in Texas, either recover the land, as on a strict foreclosure, or procure it to be sold at public sale to make the debt. In both cases the mortgagor has an opportunity at any time before judgment, and, in case of sale, probably at any time before sale, to pay the debt, and relieve the land from the incumbrance; in other words, he has a right to redeem. And if the original purchaser has sold the land to a third person, and the deed has been duly recorded, or made known to the original vendor holding vendor's lien, the latter cannot turn such third person out of possession or extinguish his rights without legal process. No case can be found, I think, in the Texas reports which would sanction such a doctrine. The rights of the vendee being the same as those of a mortgagor, they must be extinguished in the same way. They are vested and well defined in the law. They constitute an estate called, it is true, by the name of an equity of redemption; but still an estate which may be conveyed, incumbered and laid under other liens. And the heirs and assigns of the vendee and subsequent holders of liens on the property against him cannot be

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disregarded or ignored by the original vendor or his assigns, when they desire to extinguish this estate.

The cases principally relied on to show a contrary doctrine, are *Dunlap v. Wright*, 11 Texas, 597; *Webb v. Maxan*, id., 678; *Baker v. Ramey*, 27 id., 52; and *Caldwell v. Fraim*, 32 id., 310. In the first case there was a mortgage for purchase money, and the vendor was in possession after the vendee was in default, and remained in possession many years, until the mortgage debt became outlawed. The vendee then sued for the land, without offering to redeem. It is hardly possible to imagine how a doubt should have been raised in such a case. Though the personal debt, on the paper which represented it, may have been outlawed, for the purpose of a personal action, the claim of possession by the vendor as security for the debt was not outlawed. It was continuous. The legal title and the possession were both in the vendor. The vendee set up no equity to counteract these. How was it possible for him to recover? In *Webb v. Maxan*, the latter had purchased the equity of redemption, but this purchase was unknown to the original vendors who obtained a decree to enforce their lien. Maxan filed a petition for an injunction. The district court granted it, and allowed him to redeem. The supreme court reversed the decree. They say: "It is supposed that the judge arrived at this conclusion because Maxan was not made a party to the suit for the foreclosure of the mortgage, and it is admitted that as a subsequent incumbrancer, he ought to have been made a party, if the fact of his being such incumbrancer was known to the mortgagee. There is, however, nothing in the record to show that the mortgagee, at the time of the commencement of the suit to foreclose his mortgage, knew of this subsequent incumbrance; and there is no evidence that the mortgagor had left the possession of the mortgaged premises; and the inference is fair that he was in possession when the suit was brought." It seems to me that this is a clear statement of the law exactly as I have supposed it to be. In *Baker v. Ramey*, the court held that the vendor's lien remained good although the notes given for the purchase were barred by the statute of limitations. This

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has been frequently held in other states. In New Jersey, many years since, it was solemnly decided, and has always been regarded as good law, that ejectment on the mortgage could be brought by the mortgagee at any time within twenty years (the time of limitation as to real actions), although the mortgage debt was barred. In Texas, where all actions and suits are the same in form, the mortgagee would properly be entitled to recover the land in like manner, notwithstanding the bar had accrued as to the debt. This peculiar feature of the law of procedure in Texas is happily explained by Judge LINDSAY in the last of the cases relied on, *Caldwell v. Fraim*. In that case the court state the general effect of a reservation of the vendor's lien. They say: "Under our system of jurisprudence, the vendor occupies the double position of vendor and mortgagee." Again, "The perfect title under our law is the consolidation of the legal and equitable titles, which our courts may accomplish on the trial of any case if the proper parties are before them." Again, "If a mortgagee, who has an interest in land for the security of a debt, is in possession of the mortgaged premises, the mortgagor cannot recover from him that possession until the debt secured by the mortgage has been paid or extinguished by the rents and profits." Again, "Till the legal and equitable titles are consolidated in the vendee, he has no cause of action against his vendor for the possession; for, in this suit for the possession, the title has to be tried, and the equity remains in full force as long as there is an unpaid residue of the purchase money." In all this, I see nothing at variance with the long and well understood relations between mortgagor and mortgagee. If the court means to say, that the mortgagor, as between him and the vendor, is not legally entitled to the possession of the land even before the mortgage debt has matured, they only adopt the olden views of the mortgagee's rights. If they are referring to the relations which exist after the debt has matured, they state the more modern doctrine. But in nothing do they disaffirm the views before expressed as to the essential nature of the equity of redemption, its assignability, and the necessity of legal process

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against those notoriously interested in it before it can be barred or foreclosed.

2. We come then to the second ground of defense ; that the deed from Brady to Hamblin was not properly recorded, and was not known to the parties holding the purchase notes when their suit was instituted. It is admitted that the deed was not recorded in the registry or record book of deeds, where it should have been. The attorney of Gardner, Bacon & Co., to whom some of the purchase notes had been indorsed, and who instituted the suit for the recovery thereof, when about to commence proceedings, was informed by Hamblin that such a deed had been given, and was recorded ; but both he and Hamblin, having searched for it, were unable to find it. The fact is, it had been recorded, by mistake, in a separate book kept for the registry of mortgages. I have not been referred to, and have not been able to find in the Texas registry laws any direction to record deeds and mortgages in separate sets of books. But there is a manifest propriety in doing so, and it is the general practice throughout the country. That practice seems to have been adopted in Harris county, if not generally in this state. I am inclined to hold, therefore, that the recording of a deed in the registry of mortgages was an irregular registry of the deed as such, and imposed no legal or constructive notice of the deed upon third persons. No one can reasonably be expected to search for deeds in the record of mortgages. It cannot be a legal duty binding on those to be affected by the registry. The registry of a deed given by a person before acquiring title to the lands (who afterwards acquires title), not being in the regular order and chain of title, has been held not binding on subsequent purchasers and incumbrancers ; because they are not expected to search for deeds in such person's name before he acquires title. On the same principle it may be very plausibly contended that the registry of the trust deed in this case, in the book of mortgages, was void.

But the holders of the notes secured by the vendor's lien were just as much bound to make the trustee a party to the suit for foreclosure if they had notice of the deed in any other way,

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as if it had been recorded. Actual notice is quite as effective as constructive notice. This, indeed, is conceded. But the defendants deny that they had actual notice. Much evidence has been taken on this point; but it is unnecessary for me to advert to it in detail. The circumstance already adverted to, that the attorney of the mortgagees was directly and positively informed by the original trustee, before instituting suit, that such a deed had been given, together with the fact sworn to by the trustee and his successor, Turner, that they were put into possession as such trustees, and that the New Houston City Company under them, by its officers, agents and tenants, actually possessed, occupied, used and improved the land during the years 1867 and 1868, furnish such strong evidence of notice, that I am forced to conclude that the parties had notice of deed. The circumstances operating to the contrary, such as the want of success in finding the deed on record, and the fact that the Bradys, representing the company in the management of the land, might as well have been taken to have represented the original purchaser, John T. Brady, are not sufficient, in my view, to overcome the strong presumption of notice arising from the facts of the case, and the verbal notice actually given to the attorney. It is clear that the company, by its trustees, officers and tenants, were in actual possession of the tract, and made considerable improvements upon it; and possession is implied notice of title; that is, it imposes upon third parties interested to know it, the duty of inquiry to ascertain the particular title by which the possession is claimed.

I hold, therefore, that the mortgagees had sufficient notice of the trust deed to put them upon due inquiry of the proper persons as to its contents, notwithstanding it was not recorded; and that they are to be presumed as having full knowledge of it.

3. But, lastly, the defendants insist, that even if this be so, the complainants in this case are not proper parties to bring suit to redeem the property in question; that if the mortgagees failed to make sufficient parties to their suit for foreclosure, the party lacking in that suit was not these complainants, but

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was the trustee under the trust deed, who, at the time of bringing suit on the notes, was N. P. Turner, the successor of Hamblin in the trust; and that he was aware of the suit and could have redeemed the property at that time by paying the debt; at all events, that the complainants are mere stockholders of the New Houston City Company, and not even officers thereof; and have no such interest in the equity of redemption as to entitle them to file a bill for redemption.

It is true that Turner was trustee at the time referred to, and that he could, if supplied with funds, have redeemed the property. But that is not material. He was not made a party to the suit. Had he been made such party, the company and its stockholders (it was a joint stock company and not a corporation) would or might have been put on their guard; and would or might have provided him with means to pay the debt. The failure to make him a party, knowing, as I have supposed the mortgagees are bound to know, the interest he had in the lands, left that interest unforeclosed. He, or those whom he represented, are still entitled to redeem the land by paying the debt. This would clearly be the case anywhere else except in Texas; and I think I have shown that the law of Texas is not, in substance, different in this respect from that of other states.

But the question still remains, Are the complainants the proper parties to file a bill for redemption?

The proper person to file such a bill would be the trustee. The original trustee, to whom the trust deed was made, was Hamblin. He resigned in 1867, in consequence of some difficulty with the officers of the company, and a new trustee, Turner, was appointed in his place by the directors, in pursuance of the provisions contained in the deed. Turner accepted the trust and proceeded in the execution thereof, and, as before stated, was trustee when the suit was instituted on the purchase notes. But, as he was president of the Young Men's Mutual Real Estate and Building Association when that association purchased the land at the sheriff's sale, the New Houston City Company deemed him an improper person to

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represent it any longer as its trustee, and the directors of the company revoked his powers as such in March, 1870, but appointed no other person in his place. It is obvious that he would occupy a very anomalous and contradictory position, if he were required to represent the New Houston City Company. Even if his powers had not been revoked, the latter company would hardly have been guilty of any irregularity in filing a bill on its own behalf, and making him a defendant. They could, undoubtedly, have done this upon alleging his complicity with the defendants or his refusal to proceed. But as his powers have been revoked, and as there is now no trustee to represent the New Houston City Company, it seems to be almost a necessity, that the stockholders of the company (who are really tenants in common in the trust estate) should be permitted to sue on their own behalf. Without this, there would be a failure of justice. It is true, the directors of the company have the power to appoint a new trustee. But if they fail to do this, the stockholders should not be precluded from pursuing the rights to which they are equitably entitled.

I am, therefore, of opinion that the present suit will lie.

The decree must be that the complainants be permitted to redeem the property by paying the entire debt, interest and costs, within thirty days after the passing of the final decree in the case; that in the meantime it be referred to a special master to take and state as well an account of the rents and profits received by the defendants, as of the whole amount due for principal, interest and costs on the original purchase notes, or the judgment recovered thereon in the district court for Harris county; and that he have leave to use the evidence already taken, or to take additional evidence; and to examine the parties, their books of account, etc.; and that the amount to be ultimately paid by the complainants shall be the balance that may remain unpaid after deducting the said rents and profits from the amount of said debt, interest and costs; but if the balance should be on the other side, that the defendants shall pay the same to the complainants; and that the defendants upon such payment being fully made, do convey the premises in question

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to the complainants, by a good and sufficient deed in that behalf, free and clear of any incumbrances made or suffered by them.

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**THE BOLIVAR VS. THE CHALMETTE.**

1. A low rate of salvage should be allowed where the salvors in good weather simply towed a vessel disabled, but in no immediate danger, a distance of thirty miles to a safe anchorage, but incurred no risk of life or property, and no deviation from their ordinary pursuits.
2. When a disabled vessel needed towage only, and her officers applied therefor to a tug, which refused towage and insisted on taking her chances as a salvor, and this was not prevented by the officers of the disabled ship; *held*, that these circumstances tended to reduce the grade of salvage allowance.
3. In this case the decree of the district court allowing ten per cent. salvage was reversed because the allowance was too large, and a decree rendered for five per cent. only.

**ADMIRALTY APPEAL.**

In June, 1871, the bark *Chalmette*, which was at anchor outside of Galveston bar, receiving a cargo of cotton brought by lighters from Galveston, was driven by a storm from her moorings, a distance of thirty miles, when she came to anchor in a disabled condition. She was towed back to her anchorage by the tug *Bolivar*, whose owners filed a libel against the bark for salvage. The other facts of the case sufficiently appear in the opinion of the court.

*Mr. O. M. Watkins*, for libellant.

*Mr. W. P. Ballinger*, for claimant.

BRADLEY, Circuit Justice. It is admitted that this is a case of salvage. The question is simply one of amount of allowance, and mode of distribution.

The conviction is very strongly impressed upon my mind that it is a case of very low grade of salvage. There was no danger incurred by the salvors, no risk of life or property, no deviation even from ordinary pursuits — or if any deviation, a mere ex-

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tension of them to an unaccustomed distance from shore. The ship salved, it is true, was in a disabled condition, and needed assistance; but she was perfectly safe at the time, lying in almost still water, about thirty miles from Galveston bar, and twenty miles from land, with one anchor and two chains out; and her captain, who was in Galveston, knew her location and situation, and was engaged in seeking the services of a steamer or tug boat to tow her back to her anchorage ground, from which she had been driven. This was known to the salvors. The agent of the steam tug Bolivar was applied to for the services of the tug to bring her in. He declined to undertake the office of towing in the bark for an agreed compensation, but said he was going down to her to take his chances—meaning, it is presumed, his chances of securing her as a salvor, and making a claim for salvage services. Now as towing vessels in and out of Galveston harbor was the business of the steam tug, this conduct, at such a time, and under such circumstances, was somewhat extraordinary. Had not the captain finally yielded to this proposition, and asked for a passage to his ship for himself and some of his crew who had left her, it might well have been doubted whether it was a case of salvage at all. If my ship is disabled, but perfectly safe for the time being, and I go ashore to employ a tug boat to tow her into port, in mild weather, presenting no danger or risk, can the owners of vessels whose business it is to do just such work, decline my employment and hasten off in a race to see which shall first seize my ship as a salvage prize? This, instead of encouraging that enterprise and daring which the laws relating to salvage are intended to foster, would be to encourage sharp practice and unconscionable speculation.

It must be admitted, however, that the Bolivar was entitled to some credit for her efforts to find the Chalmette on the 10th of June, immediately after the storm had subsided. But even with regard to that excursion, it is to be remarked that she had been loading the barque with cotton, and had two hundred bales for her then on board, and desired to be relieved of it, and to finish her job as a lighter.

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But knowing, as the agent of the Bolivar did, that the captain of the Chalmette desired a tow merely, and that there were other steamers in port or in reach which could be obtained for that purpose, and which it seems, were offered at a reasonable price, and would have been accepted at once but for some delay which they would sustain in getting ready to start; it is evident that his great haste to get off was not so much dictated by anxiety for the safety of the Chalmette as by his anxiety to be first in the race for salvage.

And, then, after meeting the pilot boat Eclipse, which had just come from the Chalmette, and learning the exact condition of the latter, and the fact that the second mate was on board, and had sent the first mate with a letter to the captain, requesting him to employ a steamer to tow the barque into port; the agent of the Bolivar must have known perfectly well, that all which the officer in charge of the Chalmette wanted was towage.

The result of the case is, that what the Chalmette needed, and was endeavoring to obtain, was simply towage; that the Bolivar refused to act as tow, and insisted on taking her chances as a salvor, and that this was not prevented on the part of the officers of the Chalmette.

Under these circumstances, whilst the salvors are entitled to a greater remuneration than mere pay for the services of towage, it seems to me that they are only entitled to a low grade of salvage allowance. I think the amount allowed is greater than the case requires. Had the Bolivar found the Chalmette in the situation in which she was, without having been previously applied to to tow her into port, and had she given her relief and brought her into port, as in ordinary cases, the amount would not have been at all excessive. It is the peculiar circumstances of the case that put a different aspect upon the question of compensation. The amount allowed by the district court is about ten per cent. I think about five per cent. would have been ample, considering the value of the ship and cargo salvaged.

The decree below will be reversed and a decree made for

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the allowance of seven thousand five hundred dollars for salvage service in the case, to be distributed as follows: To the owners and crew of the pilot boat, Eclipse, \$1,500, and the balance of \$6,000 to the Bolivar and her crew, the latter sum to be distributed as follows, to wit: To the owners of the Bolivar, \$3,000; to the captain, \$500; to the mate, \$250; to the engineer, \$250; to the second mate, \$200; to the seamen, \$1,800, to be divided equally between them; and that the claimants pay the costs of suit, both of the district and circuit courts, and that a formal decree, with the proper directions be drawn up accordingly.

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THE UNITED STATES VS. GLENN and others.

In an action on the official bond of a collector of internal revenue, where the breach alleged was his failure to account for or pay over the sum of \$64,000, it was *held* that dereliction of duty in not collecting said sum could not be shown in order to establish the breach.

This cause was heard upon a motion for new trial, the ground for which sufficiently appears in the opinion of the court.

*Messrs. Geo. Flournoy, T. N. Waul and J. Z. H. Scott*, for the motion.

*Mr. D. J. Baldwin*, U. S. Attorney, *contra*.

BRADLEY, Circuit Justice. This is an action of debt on the official bond of Frank W. Glenn, as collector of internal revenue for this district. The breaches assigned are, that Glenn did not faithfully perform his duties as collector, but received as such the sum of \$64,000, which he never accounted for or paid to the United States. To the declaration was attached a copy of the bond, and a particular statement of Glenn's accounts at the treasury department, showing the balance claimed against him. But it was not pretended, on the trial, that he had actually

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collected all the items contained on the debit side of the account, but that, under the 34th section of the act of 1864 (13 Stat., 223), he had been charged with the whole amount of the assessor's list of taxes returned to him, together with the amount of unpaid taxes turned over to him by his predecessor, and it was contended that if he had not collected them, it was dereliction of duty on his part unless he showed a sufficient excuse.

We are of opinion that, under the breach set forth in the declaration, dereliction of duty in not making collections cannot be set up at the trial. It is not the same thing as collecting and failing to pay over. At common law, it is true, any failure of duty, to any amount, involved the forfeiture of the bond and the payment of the penalty. And considerable sums were shown to have been collected by Glenn. This evidence was competent, and would have been sufficient, under the rules of the common law which once prevailed, to make him liable for the whole amount. But the courts have long since adopted a more just rule, and give judgment only for the amount actually due. And, as a very large amount was embraced in the verdict which did not consist of moneys collected and unpaid, we think that the verdict must be set aside, but with leave to the district attorney to amend the declaration.

Ordered accordingly.

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GALVESTON, DECEMBER TERM, 1872.

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BROWN VS. THE D. S. CAGE AND OWNERS.

1. It is the duty of the owners of a steamboat or other vessel to employ competent and skillful officers and mariners so far as this can be done by the use of ordinary care. A failure in this respect, which results in the injury of one of the mariners, makes the steamboat and her owners liable.

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2. The forty-third section of the act approved February 28, 1871, (16 Stat. 458), which gives any person sustaining loss or injury through the carelessness, negligence or willful misconduct of any of the officers of a vessel, or their refusal or neglect to obey the provisions of law, a remedy against such officers, does not preclude a mariner from proceeding against the vessel for damage suffered by himself in consequence of such neglect or misconduct.
3. The cost of the recovery of a mariner injured while in the service of the ship is a charge against the ship, and may be recovered in a proceeding *in rem*, and if he is injured through the neglect or misconduct of the owners or officers of the vessel, he will be allowed damages in the nature of additional wages to be recovered in the same manner.

IN ADMIRALTY. Appeal from the District Court.

*Messrs. F. M. Spencer and W. H. Stewart*, for libellant.

*Messrs. George Mason and R. T. Wheeler*, for claimant.

WOODS, Circuit Judge. The libel alleges in substance that on February 18, 1872, the libellant shipped on board the steamer D. S. Cage, then lying at the mouth of Trinity river, to serve as a mariner, in the capacity of mate; that the owners of said boat failed to observe their duty and comply with the law by keeping the steamer properly manned, and through their negligence and that of their servants failed to provide her with a first engineer and licensed pilot, whereby she was subject to the danger of explosion, and that through the carelessness, negligence and misconduct of the owners and their agents and servants, said steamer on the 20th of February, 1872, and during the voyage for which libellant had shipped, and while he was on board, exploded her boiler, breaking the arm and several of the ribs of libellant, whereby he was disabled for two months and prevented during that time from attending to his business and affairs, and was compelled to expend one hundred dollars for doctor's bills, and sixty dollars for subsistence, in and about and during his recovery. He alleges that his time is worth \$100 per month; and that by means of his said hurts, he has suffered great pain, and his health and strength have been greatly injured and will probably never be restored, and his capacity to earn wages is thereby greatly impaired.

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He says he has sustained damages, by reason of the premises, to the amount of fourteen hundred dollars.

Exceptions were filed to the libel in the district court which were sustained and the libel dismissed, and from the decree of dismissal the cause has been appealed to this court.

The exceptions now relied on are the fifth and sixth, which are in effect the same and are in substance that the libel does not set out any cause of action against the steamer.

To sustain this exception the claimant advances these propositions :

1. That the master is not liable to his servant for the negligence of his fellow servant while engaged in the same common employment. In support of this principle a large number of authorities, collected in Sherman & Redfield on Negligence, secs. 109 and 110, are cited.

It needs but brief consideration to see that this principle is not applicable to this case. The averments of the libel charge negligence on the owners of the steamer as well as the master in not providing officers suitable for running her with safety. The case is not therefore one of negligence of a fellow servant simply, but negligence and misconduct of the common employee is also charged.

A master is liable to his servant as much as to any one else for his own negligence. *Farwell v. Boston and Worcester R. R. Co.*, 4 Metcalf, 49; *Young v. New York Central R. R. Co.*, 30 Barb., 229; *Morgan v. Vale of Neath R. R. Co.*, Law R., 1 Q. B., 149; *Mad River R. R. Co. v. Barber*, 5 Ohio State, 541.

And if the personal fault of the master proximately contributes to the servant's injury, it is no defense for him that the negligence of a fellow servant (for which he is not responsible) also contributed to bring about the injury. *Ashworth v. Stanwix*, 107 Eng. Com. Law, 700.

It is the duty of the master and owners to employ, so far as they can do so with the use of ordinary care, servants of sufficient care and skill, to make it probable that they will not cause injury to each other by the lack of those qualities. Sherman & Redfield on Negligence, sec. 90. This, it is

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averred in the libel, the owners of the steamer did not do. We think that this averment, by including the owners of the boat in its terms, clearly takes the case out of the rule of law cited by claimant.

2. The claimant, in support of his exception, next relies upon section 43 of the act of congress, approved February 28, 1871, entitled "an act to provide for the better security of life on board of vessels propelled in whole or in part by steam, and for other purposes." 16 Stat., 453.

This section provides that the master and owner of any vessel, or either of them, and the vessel itself, shall be liable to any passenger for any damage sustained by him or his baggage from explosion, fire, collision, or other cause, if it happens through any failure or neglect to comply with the provisions of the law. And any person sustaining loss or injury through the carelessness, negligence or willful misconduct of any captain, mate, engineer or pilot, or his neglect or refusal to obey the provisions of the law, may recover damages for such loss or injury from the captain, mate, engineer or pilot causing such loss or injury.

Claimant seeks to draw the inference from this section, that a mariner on a vessel is precluded from a suit against the vessel for any injury done him, because an action against the vessel is given to passengers only for damage from fire, explosion, collision or other cause arising from neglect or failure to comply with the law, and that he is remitted by the last clause of the section to an action against the captain, mate or other officer who caused such injury.

I think this inference is unwarranted. The provisions of the act in question are cumulative, and are not intended to interfere with the rights of sailors under the maritime law, or to deprive them of remedies given them by that law.

But I think it is clear that this libel is good for a part, at least, of the amount claimed.

"There is, by the general law merchant, an obligation upon every ship owner or master to provide for a seaman who becomes sick or wounded or maimed in the discharge of his

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duty, whether at home or abroad, at sea or on land — if it be not by his own fault — suitable care, medicines and medical treatment, including nursing, diet and lodging.” Laws of Oleron, arts. 6, 7; Laws of Wisburg, art. 19; Laws of the Hanse Towns, art. 39; *Hardin v. Gordon*, 2 Mason, 541; *The Forest*, 1 Ware, 429; *The Brig George*, 1 Sumner, 151.

Applying this principle, it seems to me clear that the libellant is entitled to a part at least of the claim which he makes, namely, for the expense of his recovery, and when his injury arose from the misconduct of the officers of the vessel, that he would at least be entitled to wages during his recovery.

The only question which it appears to me can be made is, whether he can sue *in rem*, or is compelled to proceed against the master and owners.

The authorities all sustain the proposition that the cost of the recovery of the seaman is a charge against the ship. Mr. Justice STORY in *Harden v. Gordon*, 2 Mason, 548, declares that “the positive ordinances of the principal maritime nations make these expenses a charge upon the ship.” And Judge WARE, in *The William Harris*, Ware, 381, says: “There is not a single principle of maritime law more generally recognized by the usages of all commercial nations than this, that the expenses of the sickness of any of the crew shall be borne by the vessel.” If this be the maritime law, it follows that the seaman may have his remedy in a suit against the ship.

That the wages of a seaman may be recovered in a proceeding *in rem*, no one questions. This is the maritime law, and is expressly provided in the 13th admiralty rule. The expenses of the care of a seaman are considered as in the nature of wages. In *Harden v. Gordon*, *supra*, Mr. Justice STORY says: “The expense of the seaman’s care is in the nature of additional wages during the period of sickness. It stands upon the same analogy as the compensation allowed by our laws in cases of short allowance of provisions and water, where it is expressly provided that the amount shall be recoverable in the same manner as wages.” Act July 20, 1790, sec. 9 (1 Stat., 135).

So in the *Madonna D’Ida*, 1 Dodson, 37, where a claim was

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Dibble & Seligson vs. Morgan.

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made on behalf of Greek sailors for subsistence after their discharge from the ship, as well as for antecedent wages, the court did not hesitate to decree it. "It is," said the learned judge on that occasion, "wages paid in another form; it is part of the compensation for their labor, and according to the law of the country to which these men belonged, subsistence in the intermediate time must be presumed to form part of the contract for the payment of wages." In what respect does subsistence in case of a discharge differ from additional subsistence in case of sickness? To use the language of the court it is "but wages in another form;" additional wages to meet additional expenses, and constituting, if the maritime law and usage uphold the claim, a part of the contract.

I am therefore of the opinion that the expenses of recovery, being in the nature of wages, may be sued for *in rem*.

I am strengthened in this view by the fact that in the Louisiana district it is the practice unquestioned to bring actions *in rem* for the expenses of the cure of seamen.

But what relieves this case of all doubt is the fact that a part of the claim set up in the libel is the claim for wages during the time of libellant's convalescence. This brings the case directly within the 13th admiralty rule, and authorizes this proceeding *in rem*.

I am of opinion, therefore, that this suit is properly brought *in rem*, and that the exceptions must be overruled.

Decree accordingly.

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GALVESTON, DECEMBER TERM, 1873.

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DIBBLE & SELIGSON VS. MORGAN.

1. By the general usage of commercial and maritime law, a carrier by water must convey from port to port or from wharf to wharf. He is not bound to deliver goods at the warehouse of the consignee. It is the duty of the consignee to receive his goods out of the ship or upon the wharf.

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2. To constitute a good delivery upon the wharf, the carrier should give due and reasonable notice to the consignee, so as to give him a fair opportunity of providing suitable means to remove the goods or put them under proper custody.
3. The goods of the various consignees when landed must be placed in separate piles. Where the goods of several consignees were piled together in one bulk upon the wharf during a rainy and stormy day, and covered with tarpaulins so as not to be fairly open to the inspection of consignees, and a fair chance afforded to remove them; *held*, that this was no delivery.
4. An actual inspection of the goods and their removal by the consignee is not necessary to a delivery, but there can be no delivery without the opportunity to inspect and remove.
5. By the exception "dangers of the sea," as used in bills of lading, is meant all unavoidable accidents from which common carriers by the general law are not excused unless they arise from the act of God.
6. A loss which might have been avoided by proper foresight and prudence cannot be attributed to "dangers of the sea," and to relieve the carrier from liability for such loss, he must show that due diligence and proper skill were used to avoid the accident, and that it was unavoidable.
7. A loss by the "act of God" must be shown to have happened by a natural and unavoidable necessity, arising wholly above the control of human agencies, and independent of human action or neglect.
8. Any act of omission or carelessness on the part of the master or crew contributing to the loss, takes away the defense that the loss was occasioned by the act of God.

Submitted to the court on the issues of law and fact.

*Mr. W. P. Ballinger*, for plaintiffs.

*Mr. T. N. Waul*, for defendant.

WOODS, Circuit Judge. This suit was brought by the plaintiffs to recover of the defendant as a common carrier the value of certain merchandise shipped by them at New Orleans and Galveston, in July, 1866, in the steamship Harlan, to be delivered at Indianola, Texas.

One of the bills of lading acknowledges the receipt of the goods in good order and condition, and provides that they are to be "delivered in like good order and condition at the end of the ship's tackles at the port of Indianola the dangers of fire at sea or on shore, collisions, and accidents from machinery,

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boilers, steam, or any other accidents and dangers of the seas, rivers, and steam navigation of whatever nature or kind soever excepted," and that "the landing of the goods upon the wharf should be considered a delivery to the consignee."

The other bill of lading simply provides for the delivery of the goods therein mentioned in good order and condition at the port of Indianola (the dangers of the seas only excepted.)

The plaintiffs allege that the goods were never delivered, and judgment is asked for their value.

The defendant answers that the Harlan arrived at the port of Indianola on July 11, 1866, of which plaintiffs had immediate notice, and that the goods were delivered to them before noon on the same day.

The facts as developed by the testimony, are as follows: There is but one wharf at Indianola where goods are usually delivered. It extends into the bay about one-eighth of a mile. The Harlan arrived at the head of this wharf a little before 8 o'clock, A. M., of the 11th of July, 1866, and immediately commenced discharging her cargo upon the wharf head. At this time the weather was misty and there was drizzling rain, and before noon the weather became violent and stormy. The freight of the Harlan was all landed before 12 o'clock, M., upon the wharf head, and the goods of the various consignees were piled up in one bulk and covered with tarpaulins. At least twice during the day and once at least after all the freight was landed, application was made to the officer of the ship, who had charge of the cargo, by draymen and consignees, for leave to remove some of the goods from the wharf to the shore, but he would not permit it to be done, and said they were not ready to deliver.

Early in the afternoon, the draymen whose business it was to carry goods from the wharf head to the shore, put up their horses and drays for the day, believing that no goods could be delivered on account of the violence of the weather. Some of them thought it unsafe to drive a horse and dray out to the wharf head. During the afternoon the weather became more and more boisterous; the wind blew a gale. The weather was

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so bad that it was not considered suitable for the removal of goods. They were left under the tarpaulins in charge of a watchman employed by defendant. During the night the wind blew a hurricane. A sailing vessel which was anchored to the windward of the wharf, broke from its moorings and was blown against the wharf and gradually broke it down and was driven through it. In this way the goods were thrown into the bay and lost.

The first question presented by the pleadings and evidence is, Was there a delivery, actual or constructive, to the consignees, whereby the defendant was discharged from his liability as a common carrier?

It is not disputed that the goods were landed at the right place, and where both parties expected them to be landed. They were landed at a proper time of day. The plaintiff says, however, that the weather was so bad when they were landed, that he could not be expected to receive them, that he did not receive them, that he was not allowed to receive them, and that, therefore, there was no delivery. The evidence shows that as fast as the cargo of the Harlan, which comprised much merchandise, etc., besides the goods of the plaintiff, was landed, it was placed in bulk under the tarpaulins.

By the general usages of the commercial and maritime law, it is settled that the carrier by water shall carry from port to port or from wharf to wharf. He is not bound to deliver goods at the warehouse of the consignee. It is the duty of the consignee to receive his goods out of the ship or upon the wharf. But to constitute a good delivery on the wharf, the carrier should give due and reasonable notice to the consignee, so as to afford him a fair opportunity of providing suitable means to remove the goods or put them under proper care and custody. *Richardson v. Goddard*, 23 How., 89.

Delivery upon the wharf, in case of goods transported by ships, is sufficient under our law, if due notice be given to the consignees, and the different consignments be properly separated so as to be open to inspection and conveniently accessible to the owners. *The Eddy*, 5 Wall., 495; *The Santee*, 2 Ben., 519.

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I am clear in the opinion that there was no delivery of the goods in this case, under the rules of law just cited.

The goods of the various consignees were piled together in one bulk upon the wharf, under tarpaulins, during a rainy and stormy day, where they could not be fairly said to be open to the inspection of the consignee, and a fair opportunity afforded him to remove his goods.

An actual inspection of the goods by the consignee, and their removal by him, are not necessary to a delivery of the goods, but there can be no delivery unless the consignee has the opportunity to inspect and carry away. No one can say, that upon the testimony in this case, such opportunity was given the plaintiffs.

The officer of the ship, who had charge of the landing of the cargo, declared, as the testimony shows, to one of the plaintiffs and to one of the draymen sent to carry goods from the wharf, that the goods were under tarpaulin, and that the ship was not delivering them, and refused to allow them to be disturbed.

Taking all of the facts of the case into consideration, I am satisfied that when the goods were landed upon the wharf, they were not delivered, nor did the officer of the ship, in charge of the unloading of the ship intend to deliver them by placing them upon the wharf. If I am correct in this view, it follows that the liability of the plaintiff, as a common carrier, continued after the landing of the goods. His obligation as such could not be discharged except by delivery, actual or constructive, to the consignee, unless the carrier was relieved by the act of God or through some exception in his bill of lading.

The clause in one of the bills of lading, that the landing of the goods upon the wharf was to be considered a delivery to the consignee, cannot be construed to mean, that any sort of a landing would be a delivery. The bill of lading must receive a reasonable construction. A landing in the night without notice, or a landing in the midst of a storm, whereby the goods are lost, could not be considered a delivery to the consignee.

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This brings us to the next inquiry. Is the defendant relieved from his liability, as a common carrier, by the loss of the goods through the *vis major*, or is he exempt by reason of any exception in his bill of lading?

One of the exceptions in the bill of lading is, "dangers of the seas." As long as his liability as a common carrier remained, the defendant was protected by this exception. Do the facts of the case bring him within it?

By dangers of the sea are meant all unavoidable accidents from which common carriers, by the general law, are not excused unless they arise from the act of God. To ascertain whether the loss was by such "dangers," it must be inquired whether the accident arose through want of proper foresight and prudence, and to relieve the carrier from responsibility, it is incumbent on him to prove that due diligence and proper skill were used to avoid the accident, and that it was unavoidable. *Johnson v. Friar*, 4 Yerg. (Tenn.), 48; *Whitesides v. Russell*, 8 Watts & Sergeant, 44.

The evidence shows that the goods were allowed to remain upon the wharf after the master of the ship was satisfied that a hurricane was imminent, so that he considered it prudent to cast off from the wharf and anchor in the stream. The agent of the defendant left the wharf with the goods upon it, and went to his home and never returned until next morning, after the mischief had all been done. A watchman was left over the goods, who might have given warning of danger to them in time to have them removed to a place of security. But instead of this, he abandons his post, and, after daylight, his lantern is found burning upon the wharf. No agent of the defendant, either on ship or shore, after the landing of the goods, and after a hurricane was known to be imminent, took any pains to put the goods in a place of security. Even after the demolition of the wharf had commenced, it was so gradual, that with alacrity and energy, the goods might have been saved. It, cannot, therefore, be said, that the loss of the goods was the result of unavoidable accident which could not have been prevented by due diligence and proper skill. It was, therefore,

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not occasioned by the danger of the seas, and it does not fall within the exceptions of the bill of lading.

It follows, as a further inference from these facts, that the loss was not occasioned by the act of God; for to bring a disaster within the scope of the phrase, "the act of God," for the purpose of relieving the common carrier from responsibility, it is necessary to show that it occurred independent of human action or neglect. It is only a natural and inevitable necessity, and one arising wholly above the control of human agencies, which constitutes the peril or disaster contemplated by that phrase. 2 Kent's Com., 597. Any act of omission or carelessness on the part of the master or crew, contributing to the loss, takes away the protection of the defense, that the loss was occasioned by the act of God. The *Zenobia*, 1 Abbott's Ad., 92. It follows from these views, that there never has been any delivery of the goods, and that defendant has not excused the want of delivery. He is, therefore, liable for the value of the goods, and judgment must be given, therefor, against him.

# WESTERN DISTRICT OF TEXAS.

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TYLER, APRIL TERM, 1867.

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## HABRICHT VS. ALEXANDER'S EXECUTORS.

A contract for the purchase of cotton made during the late war of the rebellion, by a subject of the king of Norway and Sweden, domiciled in the city of New York, with a citizen of the state of Texas, actually residing therein at the date of the contract, was void as against public policy and the laws of war and the spirit of the legislation of congress.

Heard on Demurrer to Petition.

*Mr. Amos Morrill*, for plaintiff.

*Messrs. O. M. Roberts and J. H. Reagan*, for defendant.

DUVAL, District Judge. The petition shows that the plaintiff, being a subject of the king of Sweden and Norway, and a citizen of that kingdom, did, on the 10th day of August, 1863, while temporarily residing in the city and state of New York, purchase of, and receive a conveyance from, C. C. Alexander, then a citizen of Fannin county, state of Texas, of 4,825 bales of cotton, weighing 2,313,927 pounds, for and in consideration of the sum of \$231,392.70, alleged to have been paid therefor. That afterwards the said Alexander fraudulently took and carried away from the possession of said plaintiff the said cotton, and converted the same to his own use, to the damage of plaintiff, \$300,000. The petition further alleges that said Alexander afterwards died, leaving a last will and testament, and prays judgment against the executors thereof for his damages aforesaid.

By an amended petition, filed the day before this cause was called for trial, the plaintiff alleges that after the purchase of

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**Habricht vs. Alexander's Executors.**

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said cotton by him, the price thereof greatly enhanced in value, and that at the time of the wrongful conversion thereof by said Alexander, the same was worth one dollar per pound, and had not been worth less than fifty cents per pound since then.

To this petition and amendment, the defendants interposed a general demurrer, and set forth, under the same, four special grounds, only two of which I will particularly notice.

The first is, that the purchase of said cotton, as alleged, was a violation of the laws of the United States, and the proclamation of the president interdicting all trade and commerce between the citizens of the United States and of the rebel states; and between persons residing and being within said rebel states, and all persons in the United States not native or naturalized citizens thereof.

Second, that said contract and purchase was in violation of the public policy of the United States.

An act of congress, passed July 13, 1861 (12 Stat., 257, sec. 5), authorized the president of the United States to prohibit all commercial intercourse by and between the citizens of the insurrectionary states, and the citizens of the rest of the United States, as being unlawful.

In pursuance of this act the president did, on the 16th day of August, 1861 (12 Stat., 1262, appendix), issue his proclamation, declaring that the inhabitants of certain states (Texas therein included) were in a state of insurrection against the United States, and that all commercial intercourse between them and the inhabitants thereof, and the citizens of other parts of the United States, was unlawful, and should so remain, until such insurrection should cease or be suppressed; and, that all goods and chattels, wares and merchandise, coming from any of said states (without special license) should be forfeited to the United States.

My opinion is that under this law and proclamation, the contract in question must be regarded as unlawful and void. But apart from them, this would still be my opinion upon generally recognized principles of international law.

When war exists between sovereign and independent nations,

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it is now acknowledged as causing, of itself, an interdiction to all trade and commerce (including private contracts) between their respective citizens or subjects. At this day, this seems to be a universal principle of law, recognized and acted upon by all of the great civilized powers in the world. It results from the nature of war itself, even as softened and ameliorated by the humanity and civilization of modern times. No other branch of law has been so rapidly progressive, or has more surely marked the advancement of the human race in civilization and enlightenment, as that of international law. But while this is so, no surer or more certain principle exists under this national code, than the one that all private contracts, made between the subjects of the two belligerents, are unlawful, without special license from the proper authority.

It is contended, however, by the learned counsel for the plaintiff, that the contract set out in the petition was lawful, because the prohibition then existing only applied to citizens of the United States engaged in war against each other. And for proof of this, the act of congress of July 2, 1864, (13 Stat., 376, sec. 4), is relied upon. It is only by this act that the provisions and prohibitions of the act of July 13, 1861 are expressly declared to apply to all persons in the United States, not native or naturalized citizens thereof. And hence, it is argued that, until this last act was passed, foreigners domiciliated or temporarily residing in the United States could lawfully trade and hold commercial intercourse with the inhabitants of the insurrectionary states. To this proposition I cannot assent. If this were so, it seems to me, that the whole policy of the restriction as to trade and intercourse would be defeated and rendered nugatory. If foreigners in the loyal states, prior to the 2d of July, 1864, could make contracts, trade, etc., with the people of the insurrectionary states, then the door was opened to vast frauds upon the national policy. The object of the prohibition to commercial intercourse was, obviously, to deprive the rebel states of the power and means to carry on the war. If citizens and subjects of foreign countries, temporarily resident in the United States, could carry on

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**Habricht vs. Alexander's Executors.**

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this trade and intercourse, they could easily have become the mediums or channels through which thousands of citizens of the United States would have been glad to use their capital in such traffic, and who would have placed means in the hands of such foreigners for that purpose.

It is my opinion that the act of congress of July 13, 1861, and the president's proclamation of the 16th August, 1861, were only declaratory of a well recognized principle of international law, which would have controlled and been in full force without them. And such, I think, was also the case as respects the act of July 2, 1864.

The plaintiff's counsel frankly stated, in his argument, that if the plaintiff had been a resident citizen of New York, he would not have brought this action. Now, I am unable to see upon what principle of law or public policy a foreigner, residing in the United States during the war, should have a right to trade and contract with the enemies of the government, when the same right was denied to citizens of the United States. A foreigner, domiciliated in a country and receiving the protection of its flag, is subject to the same prohibitions and restrictions as to trade and intercourse with the enemies of such country, in time of actual war, as attached to her own citizens. This I believe to be a well established principle of international law, and one that is essential to the security of every nation when engaged in war. That a war existed here, no one will deny.

It is true, as I believe, that the confederacy, attempted to be formed by the rebel states, was never even a *de facto* government. It certainly was never recognized as such by the government of the United States. But it is equally certain that the inhabitants thereof were regarded as belligerents, so far as the actual necessities and exigencies of the war made it necessary. They were enemies to the government of the United States, as was held by the supreme court in the prize cases, and the same rules and regulations of international law, as regarded trade and intercourse with them during the existence of the

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war, prevailed and operated as if they had been citizens of a foreign power engaged in war with the United States.

But there is another consideration which induces me to think that the contract now declared upon was unlawful.

By act of March 3, 1863 (passed prior to the date of said contract), it was provided that all property coming into any of the United States from any of the insurrectionary states, through or by any other person than an agent duly appointed under the provisions of that act, or under a lawful clearance from the treasury department, should be subject to confiscation to the use of the government of the United States. This is certainly a legislative recognition on the part of congress that it was then unlawful for any person in the United States to purchase or trade for property in the rebel states. If such property was subject to confiscation, it must have been on the ground that it was illegally acquired. If the cotton, which formed the subject matter of the contract in this case, had been seized by the authorities of the United States it would certainly have been subject to confiscation under this act. This would not have been the case if the plaintiff could legally have contracted for its purchase.

In no view, which I have been able to take of the subject, can I see how the petition can be regarded as not obnoxious to this ground of demurrer. As my opinion on this point must be decisive of the whole case, so far as this court is concerned, I shall say nothing of the other special grounds of demurrer, except that, in my opinion, the claim sued upon, and as set forth in the petition, should appear to have been sworn to and presented to the executors according to law. It was not such an unliquidated claim as required the intervention of a jury to ascertain the amount due, as claimed under the petition.

Believing that the contract, as set forth by the plaintiff, and now sought to be enforced, was contrary to public policy and international law, as well as to the laws of the United States, I must sustain the demurrer and dismiss the action.

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Graydon and others vs. Sweet and another.

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AUSTIN, JANUARY TERM, 1871.

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GRAYDON and others vs. SWEET and another.

1. The act of congress approved June 11, 1864, which suspends the running of the statute of limitations during the rebellion, is not itself a statute of limitation.
2. Article 12 of the constitution of Texas, which declares that "the statutes of limitation of civil suits were suspended by the so called act of secession of January 28, 1861, and shall be considered as suspended within this state until the acceptance of this constitution by the congress of the United States," does not conflict with the said act of congress.
3. The constitution was accepted on March 29, 1870. Therefore when an action was commenced on May 8, 1871, for goods sold in 1860, the plea that more than two years had elapsed after the cause of action had accrued and before suit brought, and that more than four years had elapsed after the close of the war and after the time the court was reopened to suitors, was held bad and stricken out.

Heard on exception to the plea of the statute of limitations.  
*Messrs. M. H. Barnes and A. S. Walker*, for plaintiffs.  
*Mr. A. M. Jackson*, for defendants.

DUVAL, District Judge. This suit is brought to recover the value of certain goods, wares and merchandise alleged to have been sold and delivered by the plaintiffs to defendants in the year 1860. The petition was filed on the 8th of May, 1871. On the 9th of June, 1871, the defendants answered, setting up the general denial, and pleading in bar that more than two years had elapsed after the cause of action accrued, and before suit brought, and that more than four years had elapsed after the close of the war, and after the time when this court was reopened to suitors, etc.

There was a demurrer filed to the petition on the 9th of June, 1871, which was met and the objection cured by an amended petition filed June 13th, 1871.

On the 21st of June, 1871, plaintiffs filed an exception to the plea of limitation, and now ask that the plea be stricken out, be-

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Graydon and others vs. Sweet and another.

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cause by art. 12 of the constitution of the state of Texas, it is declared that "the statutes of limitation of civil suits were suspended by the so called act of secession of the 28th of January, 1861, and shall be considered as suspended within this state, until the acceptance of this constitution by the United States congress." This acceptance occurred on the 29th of March, 1870. If this provision of the constitution of the state of Texas controls the question of limitation in this case, it is evident that this suit is not barred.

But it is contended by defendants' counsel that this constitutional provision is controlled by the act of congress of June 11, 1864 (13 Stat., 123), and that so far as the national courts are concerned, the question of limitation must be governed by the latter. By this act it is declared that "whenever during the existence of the present rebellion, any action, civil or criminal, shall accrue against any person who, by reason of resistance to the execution of the laws of the United States, or the interruption of the ordinary course of judicial proceedings, cannot be served with process for the commencement of such action, or the arrest of such person, or whenever after such action, civil or criminal, shall have accrued, but such person cannot, by reason of such resistance of the laws, or such interruption of judicial proceedings, be arrested or served with process for the commencement of the action, the time during which such person shall so be beyond the reach of legal process shall not be deemed or taken as any part of the time limited by law for the commencement of such action."

This act does not specify any time within which an action shall be brought. In this respect it lacks an essential feature belonging to a statute of limitations. At the time of its passage, the civil war was going on, and it simply declared that during the existence of the rebellion, the time during which the ordinary course of judicial proceedings was interrupted should not be deemed or taken as any part of the time limited by law for the commencement of an action. It did not provide that when such interruption ceased, or process could be served, the limitation provided by law should begin to run. Had it done

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Gray, Receiver, vs. Davis, Governor, and others.

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so, I presume there could be little doubt that the present action should be held to be barred. But the act does not so provide, and it is only by inference or implication that such a construction can be given to it.

Inasmuch as no bar is expressly created by this statute, and I am unwilling to give it a construction at variance with the rule established by the constitution of the state, I must hold that, in this case at least, the state constitutional limitation should govern. My opinion is that the exception or demurrer of plaintiffs to the plea of limitation in this case should be sustained, and said plea stricken out.

And it is so ordered.

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GRAY, Receiver, vs. DAVIS, Governor, and others.

(Before Woods and DUVAL, JJ.)

1. An act of the legislature of Texas whereby a railroad company was incorporated and a grant of lands made on certain conditions to be performed by the company is a contract between the state and the company within the meaning of section 10, article I of the constitution of the United States.
- 2 A provision of the constitution of Texas adopted subsequently to the passage of such an act, annulling it, impairs the obligation of the contract, and is therefore void.
8. The state of Texas granted lands to a railroad company on certain conditions which the company performed. A provision in a new constitution of the state purported to annul the grant, and the governor commenced signing patents to private parties for lands included in the grant: *Held*, that a bill in equity filed against "Edmund J. Davis, Governor of Texas" to restrain him from issuing patents for lands included in the grant, is not a suit against the state of Texas within the meaning of article XI of amendments to the constitution of the United States.
4. When G., a citizen of the state of New York, was appointed by a court of competent jurisdiction receiver of the property of a railroad corporation created by the laws of Texas, and domiciled in that state, the circuit court of the United States for the western district of Texas had jurisdiction of a suit brought by such receiver against citizens of that district.

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Gray, Receiver, vs. Davis, Governor, and others.

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5. The receiver of the property and effects of a railroad corporation appointed by a court of equity represents the creditors of the corporation, so that in a suit brought by the receiver to protect the property of the company, the creditors are neither proper nor necessary parties.

This was a bill in equity filed by John A. C. Gray, a citizen of the state of New York, receiver of the Memphis, El Paso and Pacific Railroad Company against Edmund J. Davis, governor of Texas and Jacob Kuechler, commissioner of the general land office of Texas, both citizens of Texas.

The case was argued and submitted on demurrer to the bill.

*Messrs. A. J. Hamilton, E. M. Pease and Gray & Davenport,* of New York City, for complainant.

*Mr. Wm. Alexander,* Attorney General of Texas, for defendants.

WOODS, Circuit Judge. This cause having been submitted on demurrer to the bill, all the facts well pleaded by the bill are for this hearing to be taken as true.

The bill alleges, in substance, that, on the 4th day of February, 1856, the legislature of the state of Texas passed an act to incorporate the Memphis, El Paso and Pacific Railroad Company, and providing that all vacant lands within eight miles on each side of the extension line of said railroad should be exempt from location or entry from and after the time when such line should be designated by survey, recognition or otherwise; that the lands so exempted should be surveyed by said company, at its own expense, and the odd sections thereof reserved for the company, and the even sections for the use of the state; that upon the grading of successive sections of said road, it should be the duty of the commissioner of the general land office of the state to issue to the company, in its corporate name, eight certificates for 640 acres of land each for each mile so graded, and upon the completion and equipment of successive sections, to issue eight other certificates of 640 acres each, for each and every section so completed and equipped, said certificates to be located upon the odd sections within said reserva-

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tion, or upon any other vacant and public land in the state, not reserved to the state, or some other corporation, and patents to be issued thereon.

That, in reliance upon the grants and guaranties aforesaid of the state of Texas, and in pursuance of the said act of incorporation, the said Memphis, El Paso and Pacific Railroad Company was, in the said year 1856, duly organized, and accepted said grant and reservation ; that on or before March 1st, 1860, the company had designated its line of road to the general land office, from the eastern boundary of Texas to El Paso, and surveyed, sectionized, and numbered the sections and fractional sections of vacant land within said reservation, from the eastern line of the state to the Brazos River, which said surveys were duly filed with the commissioner of the general land office ; and that said surveys were of great value to the state, and made at a cost to the company of more than one hundred thousand dollars.

That the company, after its organization as aforesaid, proceeded to grade its road and roadbed, and in or before the year 1861, the said road was completely graded and ready for the iron rails a distance of sixty-five miles westward from Moor's landing, in the county of Bowie ; that the rights and franchises granted to said company have never been forfeited, the legislature having extended, from time to time, the period for the performance of conditions precedent by the company, and the said legislative acts having been recognized by the constitutional convention of the state of Texas by ordinance, ratified in July, 1869 ; that sundry holders of land certificates other than those granted to said company have located and surveyed under their certificates great quantities of land within and forming a part of said reservation, and have made returns thereof to defendant, Kuechler, commissioner of the general land office, and have made application for patents therefor, and that sundry of the said patents have been signed by said Kuechler as commissioner, and his excellency Edmund J. Davis, as governor, notwithstanding the protest of said company, and said land commissioner and governor avow their intention to issue and

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execute patents for all certificates located and surveyed within said reservation, unless prevented and restrained therefrom by process of law.

The prayer of the bill is that the said company may be confirmed in its rights to said reservation and grant, and that defendants may be restrained by injunction from further interference with or infringement of said land grant and reservation, and from issuing, or causing to be issued, any patent or grant of the lands of said reservation, except to said company, or to the holders of certificates issued to the same.

This, in brief, is the case made by the bill. It is, in our opinion, difficult to imagine one more clearly demanding the equitable interference of this court, unless there be some technical obstacle to prevent. The act of incorporation and the land grant was a contract. It was between parties competent to contract, and made upon a valuable consideration. On the part of the company the contract has been in part performed at great expense to itself and great advantage to the state. To allow the state to recede from the contract would be to sanction a most unjust and oppressive proceeding.

In *Fletcher v. Peck*, 6 Cranch, 137, it was held by the supreme court that a grant of lands by the authority of the state to a citizen was a contract.

It has been held by the same court that a legislative act declaring that certain lands which should be purchased for the Indians should not thereafter be subject to any tax constituted a contract which could not be rescinded by any subsequent legislative act. *New Jersey v. Wilson*, 7 Cranch, 166. The 60th section of an act of the general assembly of Ohio, passed in 1845, declaring that each banking company organized under the act should semiannually set off to the state 6 per cent. of its net profits, which sum so set off shall be in lieu of all taxes to which the bank or its stockholders would otherwise be subject, was held to be a contract between the state and the bank. *State Bank of Ohio v. Knoop*, 16 How., 369; *Jefferson Branch Bank v. Skelley*, 1 Black, 436; *Ohio Life and Trust Co. v. Debolt*, 16 How., 432; *Mechanics and Traders' Bank v. Debolt*,

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18 How., 380. In the case first cited the court says: "Every valuable privilege given by a charter, and which conduced to an acceptance of it, and an organization under it, is a contract, which cannot be changed by the legislature when the power to do so is not reserved by the charter."

It is unnecessary to cite further authority to show that the charter and grant to the Memphis, El Paso and Pacific Railroad Company is a contract. Being a contract, its obligation cannot be impaired by the state. On this point the current of authorities is unbroken. *Fletcher v. Peck*, 6 Cranch, 137; *New Jersey v. Wilson*, 7 id., 166; *State Bank v. Knoop*, 16 How., 369; *Jefferson Branch Bank v. Skelley*, 1 Black, 436; *Terrett v. Taylor*, 9 Cranch, 43; *Bronson v. Kinzie*, 1 How., 311; *McCracken v. Hayward*, 2 id., 608; *Von Hoffman v. The City of Quincy*, 4 Wall., 535.

And it is immaterial whether the law impairing the obligation of the contract is an ordinary act of legislation or is embodied in the organic law of the state. It would be a strange construction of this constitutional provision which would forbid a state to pass an act by its legislature, and yet allow the same provision to be permanently embedded in its jurisprudence, by the enactment of a constitutional convention. It is not a particular manner of doing the thing, but the thing itself which is prohibited. In the case of *Dodge v. Woolsey*, 18 How., 331, the act repealing that portion of the charter of the bank which prescribed the method and limit of taxation, was founded on an express provision of a new constitution of the state, adopted after the passage of the bank charter. But the supreme court held that the fact that the people had, in 1851, adopted a new constitution, in which it was declared that taxes should be imposed upon banks in a mode different from that prescribed by their charters could not release the state from the obligations and duties imposed by the constitution of the United States.

In the case of *The Ohio Life and Trust Co. v. Debolt*, 16 How., 429, Chief Justice TANEY says: "Banks and other companies may be exempted by legislative contract, from their

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equal share of the taxes, under the belief that the corporation will prove a public benefit. Experience may prove that it is a public injury, yet if the contract was within the scope of the authority conferred by the constitution, it is like any other contract made by competent authority, binding upon the parties." Now can the people or their representatives by any act of theirs, impair the obligation of the contract without the consent of the other party to the same?

We may assume then, that the state of Texas having entered into the contract with the railroad company set forth in the bill, no act or ordinance passed either by the legislative body or a constitutional convention can impair its obligation. In other words, the charter and grants are still in full force and effect, and binding upon the state, its officers and people.

The point is made by the demurrer, that this is in effect a suit against the state of Texas, and that an action against a state is prohibited by the eleventh amendment to the constitution of the United States. It would seem a sufficient reply to this, to say that the suit is not in fact a suit against the state. It may affect the interests of the state, but the state is not a party, and therefore does not fall within the constitutional prohibition. If we are right in the views we have expressed as to the binding efficacy of the charter and grant to the railroad company, and the absolute nullity of any state law or constitution impairing its provisions, then the case stands thus: the defendants, officers of the state, are undertaking without authority of law to impair and deny the rights of the company, and to inflict irreparable mischief upon it, and threaten to continue this line of conduct. The law of the state granting the reservation of land to the company stands unimpaired and in full force; it is the expressed will of the state unrepealed and unchanged by any valid enactment, and these defendants without authority of law are undertaking to deprive the company of its rights under the law.

The case of *Dodge v. Woolsey*, *supra*, was a bill in equity filed by Woolsey to restrain an officer of the state of Ohio from collecting taxes which he alleged to be due the state. The

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complainant complained that the bank in which he was a stockholder was not liable to pay the amount of taxes claimed by the officer. The officer was acting under what purported to be a law of the state prescribing his duties, and the taxes when collected, would in part be the property of the state. The state was therefore directly interested, and the officer had no personal interest in the controversy; yet in that case the court held that a stockholder had a remedy against individuals in whatever character they professed to act, if the subject of complaint was an imputed violation of a corporate franchise, or the denial of a right growing out of it, for which there was not an adequate remedy at law. Suppose there had been no change in the policy of Texas respecting land grants to railroads; that in 1860, for instance, when this grant to the Memphis, El Paso and Pacific Railroad was admitted on all hands to be in full force, the governor and commissioner of the general land office had undertaken to locate certificates upon this railroad reservation, could there be a doubt that they might have been restrained at the instance of the company, and that a suit instituted for that purpose would not have been a suit against the state, but a suit against the officers? According to the view we take of this case, that is precisely the predicament in which the matter stands. The officers are acting without sanction of law, in violation of law, to the injury of the rights of this company; and while the state may derive advantage from the illegal acts of her officers, as Ohio would have done from the collection of any illegal tax, yet a suit against the officers cannot be, in any just sense, considered a suit against the state, nor falling within the prohibition of the federal constitution.

Numerous cases might be cited where the officers of a state have been restrained from acting by injunction in matters directly affecting the interest of the state, and the objection has never been sustained that such suit was an action against the state. *Osborn v. The Bank of the United States*, 9 Wheat., 738, was a bill in equity, praying for an injunction against the auditor of the state of Ohio to restrain him from the collection

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of a tax alleged to be illegal, and precisely the same objection was taken to the jurisdiction of the court as the one we are now considering, namely: that it was a suit against the state of Ohio, but the court said:

"It may, we think, be laid down as a rule which admits of no exceptions, that in all cases where the jurisdiction depends on the party, it is the party named in the record; consequently, the eleventh amendment, which restrains the jurisdiction granted by the constitution over suits against states, is of necessity limited to those suits in which a state is a party on the record." The court held in that case, in substance, that the exemption of the state from suability was no objection to proceedings against its officers for executing an unconstitutional law.

The authority just cited disposes of another ground of demurrer to the bill, namely, that the complainant is not competent to sue in this court. According to the case of *Osborn*, we must look to the record, and the record alone, to determine the question of jurisdiction. The bill avers the complainant to be a citizen of New York, and the defendants to be citizens of Texas. This brings the case within the provisions of the constitution and judiciary act.

In *Dodge v. Woolsey*, Woolsey, the complainant, was a stockholder in a bank organized under a law of Ohio, and Dodge, the defendant, was a citizen of Ohio. Yet, Woolsey being a citizen of Connecticut, the jurisdiction of the court was maintained.

It is further assigned, as ground of demurrer, that the creditors of the railroad company and the parties applying for patents to land within the reservation are not made parties to the bill. The creditors are neither necessary nor proper parties, because they are represented by the complainant, who is receiver.

We do not think that the persons applying for patents are necessary parties to the bill. But if they were, it is a sufficient reply to the objection that they are not made parties, to cite the 48th equity rule: "When the parties on either side are

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**La Vega vs. Lapsley and others.**

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very numerous and cannot, without manifest inconvenience and oppressive delays, be all brought before it, the court, in its discretion, may dispense with the making of all of these parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests."

The views now expressed appear to us to dispose of all the grounds of demurrer. We think the demurrer is not well taken on any of the grounds assigned. It is therefore overruled at defendant's costs.

**DUVAL**, District Judge, concurred.

**NOTE.**—This case was afterwards affirmed by the supreme court. See *Davis v. Gray*, 16 Wall., 203.

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**LA VEGA VS. LAPSLEY and others.**

1. In the United States equity courts, a bill will not be dismissed for want of equity, except on the final hearing, unless the objection be taken by demurrer.
2. Under the 63d rule of equity practice, exceptions to an answer for insufficiency must be set down on a rule day for hearing before a judge of the court. A reference of such exceptions on a day not a rule day, and to a master instead of a judge of the court, is, unless cured by some subsequent action of the court, a nullity, and is an abandonment of the exceptions.

This cause came on for hearing on two separate motions of defendants to dismiss the bill of complaint.

*Mr. Wm. Alexander*, for complainant.

*Messrs. John Hancock, Chas. S. West and W. M. Walton*, for defendants.

**WOODS**, Circuit Judge. On the 15th of January, 1869, John C. Watrous, one of the defendants, having previously answered the bill, filed his motion to dismiss the bill, "because the case stated therein was not within the appropri-

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La Vega vs. Lapsley and others.

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ate jurisdiction of a court of equity, there being no equity as shown on the face of the bill;" and on the 25th of January, 1871, the other defendants having previously answered, also filed a similar motion on the ground that "there was no equity presented on the face of the bill which would authorize the court to grant the relief prayed for."

These are, in substance, motions to dismiss the bill for want of equity, and, according to the rules and practice in the equity courts of the United States, this motion cannot be entertained until the final hearing of the case.

This precise question was made and decided by the supreme court of the United States in the case of *Betts v. Lewis and wife*, 19 How., 72. In that case the court says: "After the answers had been filed and while exceptions to one of the answers were pending, the respondent moved to diemiss the bill for want of equity and the court ordered it to be dismissed. This was irregular and the decree must be reversed. The equity practice of the courts of the United States is governed by the rules prescribed by this court under the authority conferred upon it by act of congress, and is the same in all the states. And this practice does not sanction the dismissal of a bill on a motion made while the parties are perfecting the pleadings. The question whether the bill contains any equity may be raised by a demurrer. If the defendant answer, this question cannot be raised till the hearing. *Non constat* that a defect may not be removed before the hearing. The case must be remanded to the circuit court, and if any defects exist in the bill capable of being cured by amendments, as no replication has been filed, it is within the rules of ordinary practice to allow them to be made."

Controlled by this decision we must hold that the motions to dismiss the bill for want of equity were improvidently made, and must therefore be overruled.

The motion of Watrous might be construed to raise the question of jurisdiction. A motion to dismiss for want of jurisdiction would be entertained by the court at any stage of the proceedings, or the court *sua sponte* would dismiss a bill for

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want of jurisdiction. The only ground, aside from want of equity, on which such a motion could be based in this case is that the complainant has a plain, adequate and complete remedy at law, and that under the act of congress this court of equity is therefore prohibited from entertaining it.

On looking at the prayer of the bill, it is seen that the relief prayed could not be granted by a court of law. And while not intimating an opinion one way or the other, whether the complainants have by this bill shown themselves entitled to the relief they ask (for this touches the equity of the bill), it is evident that the relief sought can only be granted by a court of equity and could not be obtained in a court of law.

A motion to dismiss the bill for want of replication is also made by defendants.

We understand the following to be in part the history of this case :

The bill was filed on the 8th day of April, 1868, and Lapsley's appearance was entered at the June rules following. At the September rules, 1868, a decree *pro confesso* was taken against Lapsley, which he moved to set aside, which motion the court, on September 11, granted on condition that Lapsley filed his answer within three days. On September 14 Lapsley filed his answer, to which, on October 5, complainant filed exceptions, which on the same day were referred to the standing master.

On November 2, before the master made his report complainant took another decree *pro confesso* against Lapsley and moved to make it absolute.

On December 2, Lapsley made a motion to set aside this second decree *pro confesso*, and on February 20, 1869, the court refused to make the decree absolute and ordered the second decree *pro confesso* to be set aside. This order the court, at the present term, has refused to set aside.

On January 4, 1869, before the order of the court setting aside the second decree *pro confesso*, Lapsley moved for leave to withdraw his original answer and file another, which motion was denied, but leave was given him to amend his said answer

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**La Vega vs. Lapsley and others.**

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in respect to the caption and verification. This order was made on February 20, 1869.

On February 27, 1869, Lapsley filed his second answer, to which complainant, on April 16, 1869, filed new exceptions, and instead of setting them down for hearing they were at once referred to a master.

The master overruled some of the exceptions and sustained others, and the report of the master was confirmed, and Lapsley ordered to file a further answer covering the exceptions which were sustained by the court. This he did on the 13th of May, 1869.

No replication having been filed by complainant, the defendants, on the 23d day of January, 1871, took a rule dismissing his bill, and motion is now made to confirm the rule and dismiss the bill out of this court.

This motion is based on the idea that complainant having failed to set down his exceptions for hearing before a judge of the court within the time prescribed by the 63d equity rule, but instead thereof having had them referred to a master, the exceptions were abandoned and a replication was due from complainant on the next succeeding rule day.

This brings up for the decision of the court the proper construction of rule 63, Equity Practice, and presents the question whether under that rule, exceptions for insufficiency can be referred to a master, or whether they must, in the first instance, be set down for hearing before a judge of the court.

We are clear that the latter practice is the correct one, and the only one allowed by the rule.

The rule says "where exceptions shall be filed to the answer for insufficiency, if the defendant shall not submit to the same and file an amended answer on the next succeeding rule day, the plaintiff shall forthwith set them down for hearing on the next succeeding rule day thereafter, before a judge of the court."

The language of this rule is so clear and explicit that there seems to be no room for construction. The plaintiff is allowed from one rule day to another to file his exceptions to an answer. Exceptions being filed, the defendant is allowed till the next

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succeeding rule day to submit to the exceptions and file an amendment, and if he fails to do so by the succeeding rule day, the plaintiff must on that day set down the exceptions for hearing before a judge on the next rule day following. The plaintiff is only allowed to set down his exceptions for hearing on a rule day, to be heard before a judge at the next succeeding rule day. To refer them to a master on a day not a rule day, as was done in this case, is to do what is not authorized by the rules, and unless affirmed or cured by some subsequent action of the court, is a nullity.

We have been referred to Leslie's Equity Pleading, and to Barton's suit in equity, to prove the proposition that it is proper course to refer exceptions to the answer to a master. This was formerly but is no longer the English practice, and is not the practice in the United States courts.

The 63d rule provides that if the exceptions are not so set down, that is, as prescribed in a former part of the rule, they shall be considered abandoned. The exceptions in this case were not so set down, and were therefore abandoned.

The court has, however, acted on the report of the master, sustaining a part of the exceptions, and the defendant has submitted to the order of the court sustaining the exceptions by filing a further answer.

In any view the exceptions are disposed of, and the defendants are entitled to have the case put to issue by the filing of the replication, and the same not having been filed, the defendants are entitled to have the bill dismissed, unless the court, for cause shown, allow a replication to be filed *nunc pro tunc*. Under the circumstances of this case, owing to the unsettled practice of this rule in this court, we are disposed to allow a replication to be filed, and to overrule the motion to dismiss the bill.

Ordered accordingly

DUVAL, District Judge, concurred.

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Jackson, Assignee, vs. McCulloch and others.

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## JACKSON, Assignee, vs. McCULLOCH and others.

1. Under the bankrupt act, a trader is insolvent when he cannot pay his debts in the ordinary course of business, although he may not be compelled to stop business on account of such inability, and although on a settlement of his affairs he may have sufficient to pay in full.
2. An assignment to a trustee by a trader of all his property, in trust for the benefit of his creditors, which necessarily puts an end to the business of the trader, and which gives a preference to some creditors over others, is made out of the usual and ordinary course of business, and if made in contemplation of insolvency, is not only *prima facie* but conclusive evidence of an intent on the part of the trader to defeat the operation of the bankrupt act; it is therefore void.
3. The trustee is charged with notice of the insolvency of the debtor, and his intent to evade the provisions of the bankrupt act, by the very tenor of such an assignment, and so are all persons claiming the benefit of the assignment.

IN EQUITY. Appeal from the District Court, submitted for final decree on pleadings and evidence.

*Mr. A. M. Jackson, in pro. per.*

*Mr. C. S. West, for defendants.*

WOODS, Circuit Judge. This is a bill in equity filed by A. M. Jackson, as assignee in bankruptcy of George B. Hollaman, to set aside a deed of assignment made by Hollaman to H. E. McCulloch, one of the defendants, for a decree, that the defendants, Frazer and wife, Leroy M. Roberts and John P. Erskine, pay to the complainant the amount respectively received by them from McCulloch, by virtue of the deed of assignment, on the debts due to them from the bankrupt, and that McCulloch be compelled to account for and pay over the proceeds of the property sold by him under and by virtue of the deed of assignment, subject to such equitable deductions as he may show himself entitled to. The ground of this claim is because the deed of assignment was made within six months before the filing of his petition in bankruptcy by Hollaman, and was made to McCulloch, who, at the time, had reasonable cause to believe that Hollaman was insolvent or was acting in contem-

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Jackson, Assignee, vs. McCulloch and others.

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plation of insolvency, and that the deed of assignment was made by Hollaman with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under the bankrupt act of congress, or to defeat the object of said act, or to impair, hinder or delay the operation of said act, or to evade the provisions thereof.

I hold the following propositions to be established law :

1. Insolvency, within the meaning of the bankrupt act, means inability to pay debts in the ordinary course of business, as persons carrying on trade usually do.

A trader is insolvent when he cannot pay his debts in the ordinary course of business, although he may not be compelled to stop business from his inability ; and, although, on a settlement of his affairs, he may have sufficient to pay in full.

2. An assignment to a trustee of all a trader's property in trust for the benefit of his creditors, which necessarily puts an end to the business of the debtor, and which gives a preference to some creditors over others, is made out of the usual ordinary course of business, and, if made in contemplation of insolvency, is not only *prima facie* but conclusive evidence of an intent on the part of the debtor to defeat the operation of the bankrupt act, and is therefore void.

3. The trustee is charged with notice of the insolvency of the debtor, and his intent to evade the provisions of the bankrupt act by the very terms of such an assignment. All persons claiming the benefit of such an assignment are chargeable with knowledge of the terms thereof, and consequently with knowledge of the insolvency of the debtor and his purpose to evade the operation of the bankrupt law.

The bare enunciation of these principles disposes of this case.

At the date of the deed of assignment, Hollaman was insolvent, and he knew it. It was his duty to go into bankruptcy, but instead of this, he chose to make an assignment, giving preference to certain of his creditors. He, therefore, intended to defeat the operation of the bankrupt act, which requires equal distribution among the creditors of the bankrupt's assets.

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**Jackson, Assignee, vs. McCulloch and others.**

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The deed to McCulloch was notice to him and to all claiming the benefit of the deed, of the insolvency of Hollaman, and of his purpose to evade the operation of the bankrupt act.

The conclusion is inevitable, that the deed of assignment must be declared null and void; that Fraser and wife, Erskine and Roberts must pay to the assignee the amounts received by them respectively from McCulloch, and where such amounts were paid in coin, must repay the same in coin or its equivalent in currency; that McCulloch must account for the proceeds of the property received and disposed of by him under the deed of trust, and not already turned over to the assignee in bankruptcy, allowing him credit for his reasonable services and expenses in selling the property, and for whatever may be collected from his codefendants, Frazer and wife, Roberts and Erskine.

Decree accordingly.



# SOUTHERN DISTRICT OF GEORGIA.

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APRIL TERM, 1870.

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COOK VS. OLIVER, Assignee, and others.

1. An act of the insurrectionary legislature of Georgia abolishing the vendor's lien is valid and binding.
2. The judgment of a court of a state in insurrection merely settling the rights of private parties actually within its jurisdiction, not tending to defeat the just rights of citizens of the United States, nor in furtherance of laws passed in aid of the rebellion, is valid.

This was an appeal from the Bankrupt Court for the Southern District of Georgia,

*Mr. R. F. Lyon*, for Cook.

*Mr. W. S. Basinger*, for defendants.

WOODS, Circuit Judge. This case presents a controversy between two creditors of certain bankrupts as to which has the superior lien upon the proceeds of certain real estate of the bankrupts which has been sold by the assignee in bankruptcy.

In June, 1863, while the state of Georgia was engaged in rebellion against the United States, John Neal recovered a judgment in Daugherty superior court against Beers and Brinson, for \$5,088, which by the laws of Georgia became a lien on the real estate of the judgment debtors of which they were then seized, or which they might afterwards acquire.

On January 5, 1865, Hamlin J. Cook sold and conveyed to Beers and Brinson, the bankrupts, certain real estate, the proceeds of which are the subject of this controversy. A part of the purchase money remained unpaid, and Cook claimed the vendor's lien therefor. The question now is, Which has the

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Cook vs. Oliver, Assignee, and others.

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better right to the proceeds of that real estate? Neal, by virtue of his judgment lien, or Cook, by virtue of his vendor's lien?

It is conceded that before sale by Cook to Beers and Brinson, the legislature of Georgia — the state being then in insurrection against the United States — passed an act repealing what is known as the vendor's lien. But counsel for Cook claimed, first. That the judgment of Neal is void, because rendered by an illegal court; and second. That the act of the legislature is of no effect, because passed by a revolutionary and unlawful body.

The decision of these points will decide the case.

The question of the validity or invalidity of the acts of the legislature of the insurgent states during the rebellion was considered by the supreme court of the United States in the case of *Texas v. White*, 7 Wallace, 738, and the law was laid down in these words:

“It is not necessary to attempt any exact definitions within which the acts of such a state government must be treated as valid or invalid. It may be said, perhaps with sufficient accuracy, that acts necessary to peace and good order among citizens, such for example, as acts sanctioning and protecting marriage, and the domestic relations governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts which would be lawful if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual though unlawful government, and that acts in furtherance or support of rebellion against the United States or intended to defeat the just rights of citizens, and other acts of like nature, must in general be regarded as invalid and void.”

This decision lays down the rule by which I feel I ought to be governed, and it accords fully with my own views. The act repealing the vendor's lien was in the exact language of the court, one “regulating the conveyance and transfer of real property.” It was not in furtherance of the rebellion against

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**Hatch vs. Burroughs.**

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the United States, and although passed by an insurrectionary legislature, must be regarded as valid.

The same principle applies to the courts of the insurgent states. If the acts of the insurrectionary legislature within the limits above indicated were valid, it would seem to follow as an inevitable inference that the proceedings of the courts which enforced and administered such laws must be regarded as valid. When the action of the courts of the rebellious states were simply directed to the settlement of the rights of private persons, when they did not tend to defeat the just rights of citizens of the United States; when they were not in the furtherance of laws passed to sustain or uphold the rebellion; when they were not used for the purpose of oppressing those who adhered to the United States; in short, when the decision of the court could not from the nature of the case be influenced by the existing rebellion, in such case the action and judgment of the court is binding on the parties actually within the jurisdiction of the court.

It follows from these views and the agreed facts in this case, that the lien of Neal, the judgment creditor, is superior to the lien of the vendor Cook for his purchase money. I feel that this is a case of hardship on Cook, but that is the fault of the legislature of Georgia and not of this court.

The judgment of the district court is affirmed.

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**NOVEMBER TERM, 1870.**

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**HATCH VS. BURROUGHS.**

(Before Woods and EASKIN, JJ.)

1. The stockholders of the Merchants and Planters' Bank of Savannah, whose charter provides "that the persons and property of the stockholders shall be at all times liable, pledged and bound for the redemption of the bills and notes of the bank, at any time issued, in proportion to the number of shares that each individual may hold and

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**Hatch vs. Burroughs.**

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possess," are liable as principals to redeem the bills of the bank at their face, after the bills have been presented to the bank and payment refused, although the assignee of the bank has assets in his hands sufficient to pay the bills.

2. Acts of the legislature of Georgia which show upon their face that they were passed in furtherance of the rebellion are void.
3. No matter how illegal or immoral the consideration of a note or bill may be, it is valid in the hands of a *bona fide* holder for value, unless made absolutely void by statute. Notes, bills, or other securities issued in aid of the rebellion are valid in the hands of a *bona fide* holder, for value.
4. The act of congress entitled "an act to admit the states of North Carolina, etc., to representation in congress," passed June 25, 1868, did not attempt to reenact the constitutions of the states, but merely recognized the fact that they had been adopted by the people, and that the states were entitled to representation in congress.

Heard on demurrer to pleas.

*Messrs. Wm. Dougherty and A. W. Stone*, for plaintiff.

*Messrs. W. S. Basinger, Wm. Law, J. M. B. Lovell and Robert Falligant*, for defendant.

WOODS, Circuit Judge. The declaration alleges in substance that at January 1, 1860, the defendant became a stockholder in the Merchants and Planters' Bank of Savannah, being the owner and holder of 100 shares in the bank, and that he still owns and holds the same. That by an act of the legislature of Georgia, dated February 13, 1854, said bank was incorporated as such. That in and by the act of incorporation it was provided that the persons and property of the stockholders should at all times be liable, pledged and bound for the redemption of the bills and notes at any time issued, in proportion to the number of shares that each individual might hold and possess. That on the times specified in the declaration, the said bank issued and put in circulation the bills or notes commonly called bank bills, which are set out and described, making in the aggregate the sum of fifty thousand dollars. That afterwards the said bank bills came into possession of petitioner for a valuable consideration then and there paid by him, and he is now the owner and holder and bearer thereof. That afterwards, to-wit,

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on the 8th day of January, 1867, he presented said bills to the president and cashier of said bank for payment, and payment was refused. That on March 15, 1867, he instituted a suit against the bank for the recovery of the money due on said bills in the circuit court of the United States, for the southern district of Georgia, and on November 25, 1867, recovered judgment against defendant in said court for \$50,000, interest and costs, and that afterwards on May 23, 1868, an execution was issued on said judgment and returned *nulla bona*. That the bank is insolvent, has suspended payment, and is without property out of which said judgment can be made.

To this declaration the general issue and eight special pleas were filed.

On the 23d day of October, 1869, by leave an amendment was filed to the declaration, to the effect that on December first, 1866, plaintiff purchased the bills mentioned in the declaration, for a valuable consideration, to wit: 15 cents on the dollar, without notice or knowledge that said bills or any of them had been issued, circulated or used in the late rebellion against the United States, or upon any other illegal consideration whatever, or had been used in any illegal manner.

To this declaration as amended the defendant has filed special pleas.

The plaintiff demurs generally to the 2d, 6th, 8th and 9th pleas to the original declaration, and to the first eight pleas to the amended declaration.

In considering the questions raised by this demurrer, we shall follow the order adopted by counsel for defendant, and take up first the 8th plea to the amended declaration, which is in substance as follows:

*Actio non*, because defendant says he was but a surety for the redemption of the bills of the said bank, without consideration, and that his risk as such surety was increased and he was exposed to greater liability by the operation of statutes of the state of Georgia, passed after the incorporation of said bank, having reference to all the banks in said state and injuriously affecting the said Merchants & Planters' Bank.

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It is insisted on the part of the plaintiff that this plea sets up only conclusions of law, and is therefore bad, but we are disposed to take the view of it advanced by counsel for defendant, namely: that the averment of suretyship is merely matter of inducement. If this view be correct, then the plea in substance amounts to this, viz: that by the case made in the declaration the plaintiff shows the defendant to be a surety only, and being such surety, his liabilities and risks have been increased. By this construction of the pleading the demurrer presents these questions:

1. Whether, under the charter of the bank, as set forth in the declaration, the defendant is a surety; and

2. Whether, by the statutes of the state of which the court will take judicial notice, the risk and liability of defendant is in fact increased.

After a careful consideration of the charter of the bank, we are unable to reach the conclusion that the stockholders are mere sureties or guarantors; on the contrary, the language seems to import, with great clearness and force, a primary liability. The persons and property of the stockholders are at all times liable, pledged and bound for the redemption of the bills of the bank. The stockholders, in person and property, are liable at all times. At the very moment the bill is issued by the bank this liability arises, and there is no word or phrase to indicate that the liability is conditional or secondary, or that it can in any way be avoided save by the redemption of the bills. In other words, it appears to us that, under this charter, the bank and the stockholders, jointly and severally, undertake to pay the bills. Not that a stockholder will redeem a bill whenever or wherever presented to him, but each stockholder, jointly with the bank, undertakes that when the bills are presented at the bank, payment thereof shall be made. It is the joint liability of bank and stockholders to redeem on presentation of the bills at the counter of the bank. We do not feel authorized to insert in the sentence which creates this liability, any terms or conditions which the law has not put there.

The liability is principal and absolute, and so we must leave

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it. That this construction is not new or strange will appear from the adjudicated cases. Angell & Ames on Corporations, sec. 611, lays down the rule as follows: "When each of the stockholders of a corporation is made personally responsible in his private estate, the stockholders are then subject to the same liabilities they would have been had they been associated for prosecuting the enterprise without a charter of incorporation."

In *Harger v. McCulloch*, 2 Denio, 123, a charter made the stockholders jointly and severally personally liable for the payment of all debts or demands contracted by the corporation. Held, by BROWNSON, C. J., that the stockholders, in their individual as well as corporate capacity, are principal debtors, although they have been incorporated with many of the privileges usually granted to men associated in that form, yet the privilege of exemption from personal liability for the debts of the company has been denied them, and their personal liability has been expressly declared. They are thus placed in relation to the creditors of the company upon the same footing as though they were an unincorporated association or partnership. In *Allen v. Sewell*, 2 Wend., 327, it was held that the members of an incorporated company were made by statute individually liable as carriers at common law, and responsible to the same extent and in the same manner as if there was no act of incorporation.

The case of *Corning v. McCulloch*, 1 Coms., 47, was an action brought by a creditor of a corporation to enforce the individual liability of a stockholder. The charter of the company provided that the stockholders should be jointly and severally personally liable for the payment of all debts and demands contracted by the corporation; that the stockholders might be sued therefor, but not until judgment had been obtained thereon against the corporation, and an execution issued and returned unsatisfied. In this case it was held that the personal liability of the stockholders for the payment of the debt of the corporation was immediate and absolute the moment the debt was contracted or incurred by the company.

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But we are referred to three cases decided by the supreme court of Georgia, where, it is said, a different construction is put upon the individual liability clause in the bank charters granted by the state. *Lane v. Morris*, 8 Ga., 476; *Carey v. Jones*, 8 id., 516; *Belcher v. Willcox*, 40 id., 391.

In reference to the first two cases named, it is sufficient to say that the language of the charter is not the same in words or substance, with the one under consideration. In those cases the charter provided that the stockholders should be liable for the "ultimate" redemption of the bills of the bank, and while we have great doubt whether the use of the word "ultimate" does in fact change the nature of the liability, yet the omission of the word in the charter before us is significant. We do not find it here and we cannot interpolate it. The case of *Belcher v. Willcox*, 40 Ga., 399, contains the first judicial construction of a bank charter granted by the state, which is in substance like the charter under consideration. With the profoundest respect for the learning and ability of that court, we are unable to concur in that decision. After a careful review of the case, we are satisfied that this is not an instance in which this court is bound to follow the adjudication of the state court. The charter of the bank forms no part of the local law of the state, the construction of which by the state tribunal we are bound to follow, although in Georgia all acts are public, yet in fact the charter is a private act, and the rule under discussion does not apply to private acts. *Williamson v. Berry*, 8 How., 495. The rule prescribing how far the United States courts are to be controlled by the decisions of the state courts is laid down by the supreme court in the recent case of *Butz v. City of Muscatine*, 8 Wall., 583; where the settled decisions in relation to a statute, local in its character, have become rules of property, the United States courts will follow the adjudication of the state courts. The decision in *Belcher v. Willcox*, *supra*, stands alone. It is recent; the statute construed is not a local one, and is not and cannot become a rule of property. It is simply a contract, and this court is free to construe it as shall appear just and right. We feel no embarrassment, then, in holding

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that under the charter of the Merchants and Planters' Bank of Savannah, the stockholders were not sureties, but principal debtors within the limits prescribed for them by the charter.

But assuming that the stockholders are sureties for the bank, has their risk been increased, and have they been exposed to greater liability by the operation of the statutes of the state of Georgia, passed after the incorporation of the bank? We are referred to three acts of the legislature, which it is claimed have this effect: the act of November 30, 1860, the act of November 30, 1861, and of November 29, 1862.

As to the two acts last named, it is sufficient to say that they were passed during the late rebellion against the United States; that on their face they clearly show that they were passed in furtherance and support of the rebellion, and that they fall within the rule laid down by the supreme court of the United States in *Texas v. White*, 8 Wallace, 733, and must be regarded as invalid and void. Of right, therefore, they had no binding force upon the bank, and cannot in any way influence the question before us.

The act of November 30, 1860, suspended for one year the penalties imposed by law upon the bank for its failure or refusal to redeem its liabilities in gold and silver. Clearly the only purpose of this enactment was to aid the bank and save it from destruction. The act is entitled "An act to grant relief to the banks." It does not compel the suspension of specie payments; it does not in terms authorize it; it merely relieves the bank, in case it is compelled to suspend, from the pains and penalties imposed by law for such suspension. How such an enactment could increase the risk or extend the liability of the stockholders, it is difficult to see. We are of opinion, therefore, that the facts as stated in the declaration do not make the defendant a surety for the bank, and that his risk has not been so increased, or his liability so enlarged, as to discharge him even were he a surety. The demurrer on the eighth plea to the amended declaration must therefore be sustained. The views already expressed settle the question raised by the demurrer on the second and ninth pleas to the original declaration. If the defendant

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is a principal debtor, then he is liable and bound to redeem the bills of the bank at their face, no matter what the plaintiff paid for them, and the fact that the bank has assets in the hands of its assignees sufficient to pay the bills is no defense to an action against the stockholders, after the bills have been presented at the bank and payment refused.

The demurrers to said 2d and 9th pleas are therefore sustained.

This leaves for consideration the demurrers to the 6th, 7th and 8th pleas to the original declaration, and the first seven pleas to the declaration as amended. These pleas are in substance:

1. That the bank bills were issued directly to the Confederate States and the state of Georgia, for the purpose of carrying on rebellion against the United States, and were so used.

2. That they were issued to the Confederate States and state of Georgia, for bonds of the Confederate States and state of Georgia, which latter were issued in aid of the rebellion.

3. That they were issued during the rebellion, for the purpose of aiding the same. That said banks entered into contracts with the Confederate States and state of Georgia for the loan of money for the purpose well known to all the parties to said contract, of aiding the rebellion, and that said bank bills were issued in connection with said illegal contracts of loan, and as the consideration therefor.

6. That said bank bills were issued by the bank in furtherance of and as a consideration for a contract between the bank and the Confederate States, with the purpose on the part of both parties to the contract of aiding the rebellion.

7. The same plea as the 6th, except that the contract of the bank is alleged to be with the state of Georgia.

8. That bills were issued by the bank to the Confederate States during rebellion, for the purpose of aiding the same, and said purpose was known to both the bank and Confederate States.

9. Same plea as 8th, except that it alleges that the bills were issued to the state of Georgia.

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10. Same as 8th, except that it alleges the bills were lent to the Confederate States.

11. Same as 8th, except that it alleges the bills were lent to the state of Georgia.

We entertain no doubt, if the facts named in these pleas be true (and on demurrer they are admitted), that as between the bank and the Confederate States, the bank bills were illegal and void, and that as between the original parties to the issue of their bills, no suit could be maintained upon them. Even when, as in the 7th plea to the original declaration, it is alleged that the bills were issued for the notes and bonds of the Confederate States and state of Georgia, which latter were issued in aid of the rebellion, the bank bills would be illegal and void as between the original parties. This is expressly decided in *Craig v. Missouri*, 4 Peters, 437, where it was held that certificates issued by the state of Missouri, in sums not exceeding ten dollars, received in payment of public dues, were bills of credit, the emission of which was prohibited by the constitution of the United States, and that a promissory note given to the state in exchange for such certificate was void. Mr. Justice STORY, in *Clark et al. v. Protection Insurance Company*, 1 Story, 122, says: "I adopt the language of Lord HOLT and Lord Chief Justice TINDAL, that every contract made for or about any matter or thing which is prohibited or made unlawful by statute is a void contract, although the statute does not mention it, but only inflicts a penalty on the offender. In other words, imposing a penalty imports a prohibition, and makes the prohibited act illegal." But the plaintiff says in his declaration, as amended, that he purchased the bills sued on for a valuable consideration, without notice that they had been issued or used in aid of the late rebellion against the United States, or upon any other illegal consideration whatever, or had been used in any illegal manner, and that he is a *bona fide* holder. This averment of the declaration is not traversed by any of the pleas, so that it stands admitted, and thus the question is presented, Whether the facts alleged in

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the pleas make the bills invalid in the hands of a purchaser for value without notice?

The well known rule of commercial law is that a *bona fide* holder for value without notice is entitled to recover upon any negotiable instrument which he has received before it has become due, notwithstanding any defect or infirmity in the title of the person from whom he received it, even although such person may have acquired it by fraud or even by theft or robbery. This doctrine is indispensable to the circulation and security of negotiable instruments, and is founded on the most comprehensive and liberal principles of public policy. Story on Promissory Notes, sec. 191. It is insisted, however, that these bills, being void because their issue for the purpose set out in the pleas was in effect prohibited by statute, are void in all the hands to which they may come. In other words, that an innocent holder cannot recover when the illegality of the instrument comes from the statute.

We think this claim too broad. The true rule is thus stated: In those cases in which the legislature has declared that the illegality of the contract or consideration shall make the security, whether bill or note, void, the defendant may insist on such illegality, though the plaintiff or some other party between him and the defendants took the bill *bona fide* and gave a valuable consideration for it. But unless the instrument has been expressly declared void by the legislature, illegality of consideration will be no defense in an action at the suit of a *bona fide* holder for value without notice of the illegality, unless he obtained the bill after it became due. *Brown v. Turner*, 7 Term, 630; Story on Prom. Notes, sec. 192; 3 Kent, 79-80; *Gould v. Armstrong*, 2 Hall, 266; *Cazet v. Field*, 9 Gray, 329; *Norris v. Langley*, 19 N. H., 423; *Converse v. Foster*, 32 Vt., 828; *Madow v. Bird*, 22 Ga., 246; *Thorn v. Yontz*, 4 Cal., 321; *Johnson v. Meeker*, 1 Wis., 436.

The notes given for a gaming consideration were by the statute of 9 Ann., ch. 14, declared to be "utterly void, frustrate and of none effect to all interests and purposes whatever." It was under this statute that it was held that a gaming note

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was void in the hands of a *bona fide* holder for value. Such great inconvenience was the result of this statute and ruling that now by virtue of 5 and 6 Will. IV., ch. 41, a bill or note given for a gaming or usurious consideration will be valid in the hands of a *bona fide* holder for value.

The result of the authorities is that no matter how illegal or immoral the consideration of the note or bill, it is valid in the hands of a *bona fide* holder for value unless made absolutely void by statute. We have been shown no statute declaring bank bills or other notes or securities issued in aid of the rebellion to be void, and we are constrained to hold such instruments valid in the hands of a *bona fide* holder for value. What has been said applies to negotiable commercial paper. It applies however with much greater force to bank bills which are issued to the community to circulate as money. To hold that an illegal or vicious consideration for the issue of such bills makes them void in all hands would disturb all the channels of business and either put an end to the circulation of bank notes, or leave the public to the mercy of the directors of the banks. The highest dictates of public policy require that the people who freely receive and pay out bank bills as money should be protected by that wise and salutary rule that cuts off all defenses to the paper when in the hands of a *bona fide* holder for value. Every man in the community who receives or pays out bank bills is interested in the stability of this rule. If the defense set up by these pleas is good for the stockholders, it would be good for the bank.

If the courts should hold that the directors of a bank might issue their thousands and hundreds of thousands of dollars for an illegal or immoral purpose, and then set up such purpose as a defense against the payment of the bills in the hands of the innocent public, they would make themselves the instruments for the accomplishment of the most stupendous frauds, and bring wide spread disaster upon the people. The whole community would be at the mercy of the banks.

It is insisted, however, that the bills in suit are made void by the second paragraph of section 17 of the present constitution of

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the state of Georgia. The plaintiff admits that the bills in suit fall within the purview of that constitutional provision, but says that the section itself is void as impairing the obligation of the contracts. We understand counsel for defendant to admit that the clause in question is open to this objection, but seek to avoid its force, on the theory that the constitution of Georgia is the act of congress, and that congress is not restrained by the provision of the constitution of the United States, which declares no state shall pass any law impairing the obligations of contracts. Without deciding whether congress itself has any power to pass a law impairing the obligations of contracts, we are very clear in this instance congress has not attempted to do so. The act of congress which it is claimed enacts the constitution of Georgia is the act of June 25, 1868. It is entitled "an act to admit the states of North Carolina, Georgia, etc., to representation to congress." The preamble recites that, whereas, the people of said states have, in pursuance of an act for the more efficient government of the rebel states, passed March 2, 1867, framed constitutions of state government which are republican, and have adopted said constitutions by large majorities, and it is enacted that said states shall be entitled to representation in congress on certain conditions, among which in the case of Georgia is, that certain provisions of the constitution shall be void, and that the general assembly of the state shall, by solemn public act, declare the assent of the state to the said fundamental condition. It seems to us to be a very strained construction of this act to hold that by fixing the terms upon which the state should be admitted to be represented, congress enacted the constitution of the state. By the resolution of March 20, 1821 (3 Stat., 645), the state of Missouri was admitted into the union upon the fundamental condition that the 4th clause of the 26th section of the 3d article of the constitution, submitted on the part of said state to congress, should never be construed to authorize the passage of any law by which any citizen of either of the states of this union shall be excluded from any of the privileges and immunities to which such citizens are entitled under the constitution of the United States.

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The constitution of Missouri recognized and established slavery. If the position of counsel for defendant is as good as respects the constitution of Georgia, then the constitution of Missouri was the act of congress, and congress established the institution of slavery in that state, which it is admitted on all hands congress had no power to do. In admitting Georgia to representation, congress did not undertake to reenact the constitution of this state; it merely recognized it as having been framed in accordance with law, and adopted by the people.

Finally, it is said that plaintiff is not an innocent holder, because he had many reasons to believe the bills of the bank illegal, but the plaintiff says he had no notice or knowledge of the illegality of the bills, and this averment is admitted by the pleas. Plaintiff admits that he bought the bills at 15 cents on the dollar of their face value. But this, it seems to us, is not notice that the bills were illegal. To a prudent man it would only indicate that the bank had suspended and was insolvent. We both concur in the opinion that the liability of the stockholders of the bank was a principal and primary liability; that admitting their liability to be that of a surety, their risk has not been increased or their liability enlarged by any valid legislative acts; that the bills of the bank (if the pleas be true) were invalid and void as between the bank and the state of Georgia or the Confederate States, but valid in the hands of a *bona fide* holder for value; that on the pleadings as they now stand, the plaintiff must be regarded as a *bona fide* holder for value, and as a consequence of these rulings the demurrer to these pleas must be sustained.

ERSKINE, District Judge, concurred.

APRIL TERM, 1871. .

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**MOLYNEAUX'S ADMINISTRATOR VS. MARSH.**

1. If a decree be satisfied, the execution should be arrested on motion, without a new bill.
2. When a decree is rendered against several defendants, a compromise by complainant, with some, as to their portion of the debt, does not release the other defendants.
3. If a creditor chooses to take fifty per cent. on the dollar from some of his debtors, no promise made to them will compel him to accept payment at a similar rate from others.
4. Where several persons are liable for the same debt, each one is entitled to know what amount of money the creditor has received; and for such purpose may cite the creditor to a discovery, by complying with the rules in such cases. Should the creditor refuse to make the disclosure, he will be liable to the costs of a bill of discovery.

**IN EQUITY.** Heard upon motion for injunction.

*Mr. A. R. Lawton*, for complainant.

*Mr. Wm. Daugherty*, for defendant.

**BRADLEY**, Circuit Justice. On the 20th day of May, 1871, the defendants obtained against the complainant and others, a decree in this court, declaring that they, the defendants, were judgment creditors of the Merchants and Planters' Bank of Savannah to the amount in the aggregate of \$435,000, and had exhausted their remedies at law, and that the now complainant and the other defendants in that case were stockholders of said bank and had in their hands, respectively, portions of the capital stock of the same unpaid, in the proportion and amounts named in the decree, amounting in the aggregate to \$631,642, of which the estate of Edmund Molyneaux, represented by the complainant as administrator, held \$96,480, and it was by said decree ordered, adjudged and decreed, that the complainants in said former suit (the defendants in this suit) should have and recover of the defendants in that suit, so much of the aforesaid several sums of money in their hands, respectively, as would pay off and discharge the demands of the complain-

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ants therein, and that execution should issue accordingly ; and as to the estate of the said Molyneaux, it was ordered and decreed, that execution should issue, to be levied upon the goods and chattels, lands and tenements in the hands of the said administrator to be administered.

The complainants in such former suit have sued out an execution against the Molyneaux estate as directed in the decree, and the marshal has levied on a house in Savannah belonging to the estate. The present bill is filed to obtain, and the application is for an injunction to prevent the sale of the property levied on, to arrest further proceedings on said decree, and to administer all the affairs of the bank through the medium of the receiver heretofore appointed.

. The question of referring the claims of the complainants in the former suit to the administration of the receiver was one of the issues fully discussed and determined in that suit, and it was held that the complainants were entitled to proceed in the manner which they had adopted, and that the fund against which they were proceeding, to-wit, the unpaid stock, was not in the receiver's hands, but was liable to be subjected to the payment of the judgments obtained by those complainants. According to the views of the court and the terms of the decree, the complainants were entitled to issue executions against each and all of the defendants without any other restrictions than these, namely : that no greater sum should be levied of the property of any defendant than the amount of unpaid stock which, by the decree, was found to be in his hands, and that no greater sum in the aggregate should be raised from the property of all the defendants than the amount due the complainants ; such were the rights of the parties at the rendition of the decree. The question now is, whether, since the decree, the complainants in that case have done anything to curtail their rights, and subject themselves to the relief now prayed against them.

If their claims have been paid and satisfied, the execution ought certainly to be arrested. But that could and should be done on motion without a new bill. It is not pretended, how-

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ever, that the claims have been paid. The bill complains that the complainants in the former suit have taken an inequitable course, by receiving fifty per cent. of the amount of their stock from some of the defendants, and agreeing to demand no more from them until all the stockholders shall have paid a similar proportion, and by refusing to make a similar arrangement with the complainant in the present suit. However capricious and partial this conduct may appear, it is not a legal ground of defense to the execution. The complainant is only required to pay the amount found in his hands by the decree.

The bill, however, alleges that the complainants in the former suit, by their agents, proposed and agreed to make a similar arrangement of fifty per cent. with all the defendants. But it does not allege that any such agreement was made with the complainant in this suit, nor that he parted with any consideration in consequence of any such proposition, and from the answer it is apparent that, at most, the agents and solicitors of the complainants in the former suit told some of the parties with whom they did make such arrangement, that they would do the same with others that might come into it. Surely such a declaration as this could not create a binding obligation to such other persons. It could, at most, only affect the validity of the arrangement made with those to whom the declaration was made. But I do not imagine that it could even have that effect. It is totally unlike the case of a debtor making a composition with his creditors.

In that case, the consent of one creditor to the composition is a consideration for the consent of the others, so that all are bound thereby. But this is a case of a creditor dealing with his debtors. If he chooses to take fifty cents on a dollar from ninety and nine of them, no promise made to them will obligate him to take that proportion from the one hundredth, and for the plain reason that none of the ninety and nine give up any consideration which they were not legally bound to pay.

The bill further alleges, and it is admitted by the answers, that the complainants in the former suit have also made similar arrangements with, and received money from, stockholders

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who were not parties to that suit. This, surely, cannot injure the complainant, but must, *pro tanto*, benefit him, for it tends to lighten the burden which the decree has cast upon his shoulders. As to the allegation, that these transactions have been privately made so that the complainant cannot know what amount of money the defendants have received; it is sufficient to say, that the case is not different from all other cases where several persons are liable for the same debt; each one is always entitled to know what money the creditor has received, and if he has any doubt on the subject, he may always cite the creditor to a discovery, by complying with the rules in such cases. In the present case the bill does not allege, and the answers do not disclose, that the claims or any considerable portion of them have been paid. The complainant is, undoubtedly, at all times entitled to a full and frank disclosure of the amounts which the defendants may have received, and if they refuse to make such disclosure they will be liable for the costs of a bill of discovery, but nothing of that kind, even, is alleged. In all these respects, therefore, the bill is without foundation, and this is the sum and substance of its allegations.

A fact is disclosed, however, by the answers, which has given me some embarrassment. It appears that the solicitors of the complainants in the former suit, in making the before-mentioned arrangements or compromises with the defendants therein (as well as with other stockholders), have made them for the equal benefit of the said complainants, and of all other billholders whom they represent, of whom there appear to be several. These outside billholders have received \$42,500 of the \$113,500 which have been collected. I cannot precisely see where the said complainants get authority to do this. The decree of the court, subjecting the unpaid stock to the payment of the judgment creditors, at whose instance it was obtained, and making it a trust fund in the hands of the stockholders for that purpose, was not made for the benefit of creditors at large. Whether billholders or others, creditors at large cannot reach that fund, and the court will not reach it for them. The

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defendants, by suffering creditors at large to share with them the proceeds of this fund, which the court has enabled them to lay their hands on for their own benefit alone, must at least be accountable for the amount so appropriated. It seems to me they must account for the whole amount of \$113,500, which has been collected from this source, and any other amount which they may hereafter collect in the same manner.

But as this amount, when credited on the decree, does not relieve the complainant from any part of his burthen, the injunction must be denied, but without costs.

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**DAVIE VS. HATCHER, Executrix.**

1. The statute of Georgia, of the 14th of December, 1861, suspending the statutes of limitation then in force during the then existing war, and suspending the statutes in cases where they had commenced to run, until peace should be declared; and the ordinance passed by the convention of the people on the 31st of October, 1865, suspending the statutes of limitation in all cases, civil and criminal, from the 19th of January, 1861, until civil government should be restored or the legislature should otherwise direct, however defective they may have been in point of original authority, were ratified by the constitution of the state, of 1868.
2. The act of the 16th of March, 1869, passed by the general assembly established under the constitution of 1868, declaring that all acts of the legislature of the state, and all ordinances of the conventions of 1865 and 1868, which have the force and effect of law, and which are retroactive in their character relative to the statutes of limitation, should be held null and void in all cases in which the statute had fully run before the passage of said retroactive legislation, does not control or modify the operation of those suspensory laws of 1861 and 1865, except in cases where the statute had fully run before their passage respectively.
3. The decision of the state courts that the statute passed in 1826, and re-enacted in 1881, by which the surety or indorser of a promissory note, after it has become due, may require the holder to proceed to collect the same, and if he does not proceed so to do within three months after such requisition, the indorser or surety shall be no longer liable, does not apply where the principal does not reside in

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the state — that he cannot be compelled to go out of the state to sue the principal, is binding on this court.

4. The omission of the holder of a promissory note to sue the maker, who resides in another state, can, under no circumstances, as between him and the surety on the note, make the holder chargeable with gross negligence.

This cause was heard upon a motion for a new trial made by defendant.

*Messrs. Andrew Sloan and L. S. Downing, for the motion.*  
*Mr. W. U. Garrard, contra.*

BRADLEY, Circuit Justice. This was an action of assumpsit commenced on the 31st of December, 1869, on a promissory note, dated at Columbus, Ga., December 30, 1858, given by Reuben Allison as principal, and Samuel J. Hatcher as surety, to P. J. Phillips, executor of H. H. Lowe, or bearer, for the sum of \$1,125, payable on the 1st of January, 1860, at the agency of the Bank of Savannah, in Columbus, with interest from date if not punctually paid. The surety indorsed a waiver of protest at the maturity of the note. The action is brought by Davie, as bearer, against the defendant as executrix of the surety. It is apparent that it was not brought for nearly ten years after the note became due, and the statute of limitations for such demands in Georgia is six years.

The principal question in the case is, whether the laws and ordinances passed since the note became due have prevented the operation of the statute upon the cause of action arising thereon. The case was tried in December last, and the judge presiding ruled that the statute of limitations had been suspended so as to save the action. By an act of the legislature of Georgia passed in December, 1860, the several statutes of limitation were suspended for one year. The ordinance of secession was passed January 19, 1861, and a new constitution was adopted in March and ratified in July following. By an act passed December 14, 1861, the statutes of limitation then in force were suspended during the then existing war, and where the statute had commenced to run, it was sus-

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pending until peace should be declared. After the war the convention of the people of Georgia, assembled by the provisional governor, in pursuance of president Johnson's proclamation of June 17, 1865, met at Milledgeville, and on the 31st day of October, 1865, passed an ordinance which, amongst other things, ordained that the statutes of limitation in all cases, civil and criminal, should be suspended from the 19th of January, 1861, until civil government should be fully restored, or the legislature should otherwise direct. Besides a constitution of the state, other ordinances were passed by said convention in the form of laws, which were observed as such for several years. By the third section of article eleven of the constitution of 1868, adopted by the convention, assembled under the reconstruction acts of congress, it was declared, amongst other things, "that all acts passed by any legislative body, sitting in this state as such, since the 19th day of January, 1861, except such as were inconsistent with the constitution of the United States, or this constitution, or as may have been passed in aid of the late rebellion," etc., should be of force in this state, but that the general assembly might alter or repeal the same, if not otherwise prohibited by the constitution. By the fifth section of the same article it was declared that all rights, privileges and immunities which might have vested in or accrued to, any person or persons under any act of any legislative body, sitting as such, or any decree, judgment or order of any court sitting in this state under the laws then of force and operation therein and recognized by the people as a court of competent jurisdiction, since the 19th of January, 1861, should be held inviolate, unless attacked for fraud or otherwise declared invalid by or according to this constitution. The general assembly, established under this constitution by an act passed March 16, 1869, declared that all acts of the legislature of this state, and all ordinances of the conventions of 1865 and 1868, which have the force and effect of law, which are retroactive in their character relative to the statutes of limitation, should be held to be null and void, in all cases in which the statute had fully run, before the passage

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of said retroactive legislation. This review of the legislation which has taken place, leads to the following conclusions: 1st. That the suspensory laws of 1865 and 1861, however defective they may have been in point of original authority, were ratified by the constitution of 1868. 2d. That the act of 1869 does not control or modify their operation, except as to cases in which the statute had fully run, before their passage "respectively." These points being established, the case does not present the slightest difficulty.

The ordinary statute in this case did not commence to run till January 4, 1860, and would not have fully run till January 3, 1866. It was suspended, therefore, both by the act of 1861, during the whole continuance of the war, and by the ordinance of 1865, from the 19th of January, 1861, until civil government should be fully restored. Deduct this period of suspension from the time that elapsed before the commencement of this suit, and it will be found to have commenced within six years from the maturity of the note. I have been referred to the case of *Calhoun v. Kellogg*, 41 Ga., 231, to show that the supreme court of this state has held that the ordinance of 1865 was not in legal operation until the constitution of 1868 made it so. I do not so understand the case. The court did decide, however, that if the statute had fully run before the passage of the ordinance of 1865, though not until after the act of 1861, the cause of action was not revived. If that decision should be regarded as decisive of the law of Georgia, still it does not affect this case. But with the highest respect for the court by which it was made, it seems to me that the dissenting views of Justice WARNER are founded on the better reason, and that they are sustained by the previous decision of the same court in *Brian v. Banks*, 38 Ga., 300. That, however, is a question of local law which it does not become necessary to decide.

Another point was made on the trial, which it becomes necessary for me to notice. It arises under the statute of this state, passed in 1826, and reenacted in 1831, by which the security or indorser of any promissory note or other instrument, after

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the same has become due, may require the holder to proceed to collect the same, and if he does not proceed to do so within three months after such notice or requisition, the indorser or surety shall be no longer liable. Such a notice was given in this case in December, 1861, by the executrix to the payee of the note, who then held the same. But it is admitted that the principal resided and still resides in Alabama. By repeated decisions of the courts of this state it has been held, that if the principal does not reside in this state, the holder of the note is not bound by the law. He cannot be compelled to go out of the state to sue the principal. Those decisions are binding on this court. It was also contended on the trial, and made a point here, that on general principles of law, if the surety require the creditor to collect the moneys of the principal, and he neglects doing so when he can, and the principal afterwards becomes insolvent, the surety will be discharged. I do not so understand the law. The contract between the parties is this: If A. does not pay the debt, I, the surety, will pay it. To make it read, if A. does not pay the debt, I will pay it, if you prosecute A. when I request it, is to introduce a new term into the contract. Who is guilty of laches, the creditor, or the surety after the principal fails to pay the debt at maturity? Is it not the duty of the surety by his contract to pay it, and not subject the creditor to the necessity of bringing a suit? There may be equitable considerations which would make it extremely hard and unjust for the creditor to refuse to prosecute the principal. But when they arise, they belong strictly to equity, and a court of equity is the proper tribunal to consider them. Mr. Parsons in his work on Contracts, after reviewing some of the cases, says: "A surety is discharged where the creditor, after notice and request, has been guilty of a delay which amounts to gross negligence, and by his negligence the surety has lost his security or indemnity." Vol. 2, 22-25. How can a surety be said to have lost his security by the negligence of the creditor to sue, when by paying the debt himself, as was his duty to do, he could at any moment have instituted suit against the principal? In this

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case the omission of the creditor to sue a principal residing in another state could not, under any circumstances, as between him and the surety, make him chargeable with gross negligence.

The motion for a new trial is denied.

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**PARSONS and others vs. CUMMING and others.**

1. If a bill does not contain specific interrogatories, the complainant must be satisfied with such answer to its allegations as would fairly occur to the professional mind as meeting them in a substantial manner.
2. Defendant is not bound to exercise ingenuity in finding out all the aspects in which a statement in a bill may be taken.
3. A general answer is sufficient for a general allegation.
4. Under the act of congress parties can be called to the stand and be examined on oath, and be compelled to answer every possible interrogatory that can be deemed at all material to the case.
5. If it is apparent that defendant has omitted to answer any material allegation, or has evaded giving an answer, or has answered disingenuously, the court will compel another answer.
6. Where discovery is a principal object, distinct interrogatories should be affixed to the bill.

**IN EQUITY.** Heard upon exceptions to answer.

*Messrs. Wm. Daugherty and A. W. Stone, for complainants.*

*Mr. A. R. Lawton, for defendant.*

**BRADLEY, Circuit Justice.** If a bill does not contain specific interrogatories, the complainant must be satisfied with such answer to its allegations as would fairly occur to the professional mind as meeting them in a substantial manner. The defendant is not bound to exercise ingenuity in finding out all the aspects in which a statement may be taken. For example, if the bill contain a general allegation of fraud or breach of duty, or failure to fulfil a trust, it may be the foundation of many specific interrogatories as to particular facts going to

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prove the allegation made; but if such interrogatories be not propounded, the defendant's answer may be as general as the allegations of the bill.

If a complainant wants to go into particulars, he must put pointed questions. A general answer is sufficient for a general allegation.

Looking at the answer in question, I am not satisfied that it is not a substantial response to the bill. It denies that the bank had any assets shortly before the assignment, except what are in the schedule annexed to the original answer. That certainly answers the charge of passing away such assets.

It denies the appropriation of any property of the bank to the use of the assignees or any other persons, except for the purposes of the trust.

It explains satisfactorily the use of the banking house and lot, and the repairs thereon, provided the explanation is well founded.

It asserts the truth and necessity of all expenditures for which credit is claimed. And, by the way, if the accounts of the assignees are complained of, they should be referred to a master for auditing, and exceptions taken to them there.

It explains the sale of confederate and other securities — the manner of which is complained of in the bill.

It admits that no payment or distribution has been made, except as ordered by the court; and the defendants throw themselves on the court for its directions, professing their willingness to pay over the money as the court may direct.

It seems to me that all the material allegations of the bill have been substantially met. But if they have not, no great harm can arise, since by recent act of congress parties can be called to the stand and examined on oath, and compelled to meet every possible interrogatory that can be deemed at all material to the case. It is therefore unnecessary for the court to be astute in finding defects in the answer, where no interrogatories have been appended to the bill, and where the allegations of the latter have perhaps not been expressed in those brief and succinct terms which the rules in equity propounded

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by the supreme court require. Had the bill contained a series of distinct, articulate propositions, briefly expressed, a comparison of the answer therewith would have been more easy and satisfactory. Of course, if it is apparent that the defendant has omitted to answer any material allegation, or has evaded giving an answer, or has answered disingenuously, the court will compel him to file another answer. And the character of the answer will always be a subject of criticism on the hearing. Where discovery is the object, or a principal object, distinct interrogatories should be affixed to the bill; and then it can be readily ascertained whether the defendant has answered them or not.

The exceptions are overruled

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**MARSH and others vs. BURROUGHS and others.**

1. A judgment creditor, who has exhausted his legal remedy by execution returned *nulla bona*, may alone, or with other judgment creditors, file a bill against persons holding property of the debtor, which on account of fraud, or the existence of a trust, cannot be reached by the execution.
2. In case a fund can only be divided satisfactorily amongst a certain class of persons, it is necessary to frame the decree in such a manner as that all those persons may be brought in for their distributive shares; but even then the bill may often be filed by any one of them on his own behalf.
3. It is only when it appears that a distribution of such fund must be made, that a decree will be entered for the benefit of all.
4. A judgment creditor, who has exhausted his legal remedy, may pursue in a court of equity any equitable interest trust or demand of his debtor, in whosoever hands it may be. If a party thus reached has a remedy over against others for contribution or indemnity, it will be no defense to the primary suit against him, that they are not parties.
5. Where a debtor, as in case of a bank, has a right to call for payment of stock subscriptions, and does not choose to exercise it, equity, at the instance of creditors, will exercise it for him.
6. When a person subscribes stock, and his subscription is accepted, it is not a mere power in the bank, but its right, to call in the money, and it is the right of the stockholder to pay it; he is not obliged to wait until a call is made.

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7. Unpaid subscriptions to the capital stock of a company are corporate property, constituting a trust fund which can be reached by the creditors in a court of equity.
8. The amount subscribed, and not the sums actually paid in, is the capital stock of the company.
9. The equity of the right in the bank to sue is attendant on the legal right vested in the holder of the bills as such; it goes with it as an incident.
10. When a judgment creditor of a bank has exhausted his remedy at law, and seeks in equity to enforce payment of stock subscriptions, the stockholders cannot go behind the judgment rendered against the bank and question the original cause of action, unless they can show collusion between the creditor and the bank, for the purpose of defrauding them.
11. The fact, that when the state of Georgia applied for readmission to the Union, under the constitution of 1868, congress imposed certain conditions, does not make that constitution an act of congress, or tantamount to such an act. (See *Hatch v. Burroughs, ante*, 440.)
12. The question, as to whether the adoption of the constitution of the state of Georgia of 1868 was the act of the people of the state, is a political one, in which the courts must follow the action of the political department of the government.
13. A state can no more pass a law violating a contract by means of a convention, than it can by means of a legislature; and a constitution adopted by a state, with a view to its admission or readmission, or after its admission into the Union, must be regarded as a law of the state, and amenable to the prohibitory clauses of the constitution of the United States. (See *Gray v. Davis, ante*, 420.)
14. The final portion of art. V, sec. XVI, subdivision 1 of the constitution of Georgia, of 1868, which throws the burden of proof on the plaintiff to show that bills sued on have never been used in aid of the rebellion, if only the defendant swears that he has reason to believe that they were so used, is not constitutional.
15. The fact, that holders of unpaid stock may have severally redeemed their share of the bills of the bank, does not release them from liability for the amount due on their stock subscriptions.

IN EQUITY. Submitted for final decree upon the pleadings and evidence.

*Messrs. Wm. Daugherty and A. W. Stone*, for complainants.

*Messrs. Wm. Law, T. E. Lloyd and W. S. Basinger*, for defendants.

BRADLEY, Circuit Justice. This bill is filed by certain bill-

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holders of the Merchants and Planters' Bank of Savannah, who have obtained judgments against the bank for the amount of bills held by them against certain stockholders of the bank, who have not paid in full their subscriptions of stock, seeking a decree against the defendants to the amount of their unpaid subscriptions, for the payment of the said judgment.

The bank was chartered by an act of the assembly of the state of Georgia, approved February 13, 1854, by which certain persons therein named, their associates and successors, were incorporated by the name of the Merchants and Planters' Bank, to be located at Savannah, with the usual powers given to such institutions. By the second section of the charter it was declared that the capital of the bank should be two millions of dollars, to be divided into twenty thousand shares of one hundred dollars each, and that so soon as ten per cent. of said capital was subscribed and paid in in specie, or specie funds, it should be the duty of the commissioners named in the act to call a meeting and organize the bank by the election of directors. The directors were empowered to appoint a president and other officers. By the seventh section the president and directors, after the first installment on subscriptions to the amount of two hundred thousand dollars had been paid in, were empowered to call in further installments of not over twenty per cent. at any one time, by giving at least sixty days' notice of said call. On failure to pay up a call the shares might be forfeited.

By the 9th section, it was declared that the total amount of the debts should not, at any time, exceed three times the amount of the capital stock actually paid in, over and above the amount of specie actually deposited in the vaults for safe keeping.

By the 15th section, it was declared that the persons and property of the stockholders should at all times be liable, pledged and bound for the redemption of bills and notes at any time issued, in proportion to the number of shares that each individual and corporation might hold and possess.

The bill alleges that the capital stock of the bank was all

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duly subscribed and the bank duly organized shortly after its incorporation, and that it went into operation, issued bills, received deposits and carried on a general banking business; that the complainants severally became lawful owners and holders of the bills of the bank, to wit: Scott, Zerega & Co., to the amount of \$62,500, which were presented to the president and cashier in March, 1867, and were not paid, and the other complainants other amounts, which were presented at or about the same time with like result; that thereupon the complainants separately instituted actions at law on their bills against the bank, and on the 25th of November, 1867, recovered judgments as follows: Scott, Zerega & Co., for \$71,789.35; Frisbee & Roberts, for \$33,134.75; Wm. N. Marsh, for \$57,600.63; George W. Hatch, for \$81,271.20; Levi H. B. Scott, for \$120,789.36; and that executions were issued in all the judgments and returned "*nulla bona*" on the 23d of May, 1868.

The bill alleges that the bank had become insolvent, and had assigned its assets to Hiram Roberts, the president, in trust for the benefit of its creditors; but that the assets assigned would not pay more than ten cents on the dollar of its indebtedness, which amounted to a million of dollars or thereabouts. As an excuse for not joining other complainants, the bill alleges that the circulation of the bank was held in every state of the Union by innumerable unknown persons; and as an excuse for not making all the stockholders defendants, it alleges that there are 20,000 shares of stock held by a great number of stockholders residing in different states—some insolvent, some dead, etc.

The bill then alleges that the defendants are stockholders, and states the number of shares held by each, and the amount paid thereon, and the amount still unpaid, and claims that the unpaid stock is a trust fund applicable to the payment of the debts of the bank, inasmuch as the debts cannot be paid by the assets. The bill prays that this may be so decreed, and that the defendants may be required to pay to the complainants, or into court, or in some other manner, the several amounts so in their hands respectively, and that the same may be applied

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to the payment and satisfaction of the bills held by the complainants.

By an amended bill, they allege that they purchased the bills prior to January 1, 1867, in a fair course of trade, for a valuable consideration, and without any notice that they had been used in aid of the rebellion or for any other illegal purpose. The principal facts stated in the bill are not disputed. The defendants, by their answers and in argument, set up various grounds of defense, which I will proceed to examine.

1. It is objected that the bill is defective for want of parties, both complainant and defendant; that it should have been filed by, or in behalf of, all the creditors, because all are interested in the funds—and against all the stockholders, because all are bound to contribute *pro rata*. As to the complainants, it has long been settled that a judgment creditor who has exhausted his legal remedy, by execution returned “*nulla bona*,” may alone, or with other judgment creditors, file a bill against persons holding property of the debtor which, on account of fraud or the existence of a trust, cannot be reached by execution. 2 Kent’s Com., 443 and notes; *McDermott et al. v. Strong*, 4 Johns. Ch., 687; *Spader v. Davis*, 5 id., 280; *Lentilhon v. Moffatt*, 1 Edw. Ch., 451; *Dix v. Briggs*, 9 Paige, 595; *Storm v. Waddell*, 2 Sandf. Ch., 494; *Ogilvie v. Knox Insurance Co.*, 22 Howard, 380; *Dunphy v. Kleinschmidt*, 11 Wallace, 610.

Where a case exists in which a fund can only be divided satisfactorily among a certain class of persons, it is necessary to frame the decree in such a manner as that all those persons may be brought in for their distributive shares; but even then, the bill may often be filed by any one of them on his own behalf. It is only when it appears to the court by the subsequent pleadings, or otherwise, that a distribution must be made (as where an executor pleads want of sufficient assets), that a decree will be made for the benefit of all. In this case, what law compels an equal distribution of the fund sought to be reached amongst all the creditors? The assets in the hands of the assignee are subjected to such a law, because they have

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been granted to him in trust for all creditors equally. But it is conceded that the unpaid capital stock is not subject to the assignment. If subjected to the demands of the complainants as judgment creditors, it will be exonerated, *pro tanto*, from all further demands.

As to the nonjoinder of necessary defendants, the same authorities above quoted may be cited. A judgment creditor, who has exhausted his legal remedy, may pursue, in a court of equity, any equitable interest, trust or demand of his debtor, in whosoever hands it may be. And if the party thus reached has a remedy over against other parties for contribution or indemnity, it will be no defense to the primary suit against him that they are not parties. If a creditor were to be stayed until all such parties could be made to contribute their proportionate shares of the liability, he might never get his money.

2. It is contended that the unpaid subscriptions of capital stock are not assets for the payment of debts, either legal or equitable; that they exist merely as possibilities; that they are not a debt due, having never been called in; that no one can call them in but the directors; and in them it is a mere discretionary power, which cannot be exercised, either by the assignee, the receiver, or the court itself, and cannot be assigned; that said unpaid subscriptions are no part of the capital stock of the bank; and that the real capital stock is what has been called in, namely \$535,000, and not \$2,000,000.

This position may be somewhat plausible, but it is not sound. It is not a mere power vested in the bank to make further calls. It is a right; and where a debtor has such a right and does not choose to exercise it, equity, at the instance of creditors, will exercise it for him. When a stockholder subscribes stock, and his subscription is accepted, it is not only the right of the bank to call in the money, but it is the right of the stockholder to pay it. The mode of calling it in, prescribed by the charter, is a mere form of remedy given to the bank to enforce the subscription, usually followed by forfeiture for nonpayment, if the bank so choose. But the stockholder is not obliged to wait until a call is made upon him. He may pay in at any time;

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and if the business of the bank were very profitable, no doubt he would avail himself of the opportunity. Such a right cannot be described as a mere power on the part of the bank, to be exercised or not, as it chooses, and dependent for its existence on the personal discretion of the directors.

The same objections were made in the case of the *Planters and Mechanics' Bank of Columbus*, and were overruled by the supreme court of this state in *Hightower v. Thornton and others*, 8 Georgia, 486, and it was there held that unpaid subscriptions to the capital stock of a company are corporate property, constituting a trust fund, which can be reached by the creditors in a court of equity; and that the amount subscribed, and not the sums actually paid in, is the capital stock of a company. As to the position that the equity of the creditor is a mere right to sue, and is not therefore assignable, and could not be assigned to complainants, it is sufficient to say that the equity is attendant upon the legal right vested in the holder of the bills as such. It goes with that as an incident, and does not belong to that class of mere rights of action which become separated from the thing out of which they grew, and attach to the person only — as the right to sue for a trespass committed and the like.

3. The next point made is, that if the unpaid subscriptions are indeed assets for the payment of debts, then they have been assigned, and are in the receiver's hands, and must be collected and administered by him for the equal benefit of all the creditors under the trust of the assignment.

But an examination of the assignment will show that it does not assume to convey these subscriptions; but on the contrary specifically assigns those things which are set out in a schedule annexed to the assignment, and does not contain any general words sufficiently comprehensive to cover stock subscriptions. And as the assignment is a common law instrument, deriving no extraneous efficacy from the statute law of Georgia, except the general statute which gives assignability to bonds, specialties and other contracts in writing for the payment of money, or any article of property, judgments and executions (Code, article 2725), it cannot be construed to reach the claims in ques-

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tion. Besides, the attitude of the bank, its directors and stockholders, from the first, has been inconsistent with the idea that these unpaid subscriptions were embraced in the assignment. It is just what they always have opposed and denied.

4. Another point quite strenuously urged by the defendants is, that the bills held by the complainants were issued directly to the Confederate States government, and to the state of Georgia during the rebellion, and in aid thereof. The answers severally allege this fact, and the only evidence offered by complainants to rebut it is proof that they purchased the bills in open market, in regular course for value paid, without any notice or suspicion that they were issued for any illegal purpose. The defendants, therefore, rely on the article V., sec. XVI, subdivision I, of the constitution of 1868, which not only nullifies all contracts made during the rebellion, in aid thereof, but all bonds, deeds, promissory notes, bills or other evidences of debt, made in connection with such contracts, or as the consideration therefor, or in furtherance thereof; and declares that when the defendant will make a plea, supported by his affidavit, that he has good reason to believe that the obligation or evidence of the indebtedness on which the suit is predicated, or some part thereof, has been given or used for the illegal purpose aforesaid, the burden of proof shall be upon the plaintiff to satisfy the court and jury that it is not founded upon, or in any way connected with, any such illegal contract, and has not been used in aid of the rebellion; and the date of the bill, etc., shall not be evidence that it has or has not, since its date, been issued, transferred or used in aid of the rebellion.

Now, in reference to this point, it is to be observed that it does not fairly arise in the case. The bill of complaint is founded on certain judgments and executions in favor of the complainants, which were recovered in 1867. Had any such defense, as is indicated by the answers existed, it should have been made to the actions at law; for, although the constitution did not then exist, yet it would have been a good defense to have shown that the bills were issued in aid of the rebellion, and that the plaintiffs knew it, or had reason to know it. Not being set

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up then, it cannot be set up now. The stockholders of the bank cannot ask to go behind the judgments rendered against the bank, and question the original cause of action, unless they can show collusion between the plaintiffs and the bank, entered into for the purpose of defrauding the stockholders.

But even if the question were open I could not yield to the force of the defendants' argument. They contend that the constitution of 1868 has all the force and effect of an act of congress, and, therefore, is not obnoxious to that clause of the constitution of the United States which declares that no state shall pass any law impairing the obligation of a contract; that the constitution of 1868 has the force and effect of an act of congress, they insist, because it was adopted under the reconstruction acts, under military supervision, and not by the free consent and express will of the people of Georgia, and because, after its adoption by the convention, it was revised by congress and certain parts were struck out — or, at least, congress made it a condition of admission that they should be struck out — and that the legislature should ratify the fourteenth amendment to the constitution of the United States (see act of June 25, 1868, 15 Statutes at Large, 73); and that this was, in effect, an approval and adoption by congress of the parts not excepted to.

I cannot concur in this view. What was the precise status of Georgia after the war, and before its readmission into the Union, with all the normal relations of a state, will, perhaps, never be defined to the satisfaction of all. But that some sort of rehabilitation was necessary in order that Georgia might occupy her old position in the Union — that the adoption of a new constitution was one of the necessary things to be done, and that an act of the national authority, admitting Georgia to the representation and status of a state in harmonious relations with the Union, was also a necessary thing to be done — seem to be propositions that can hardly admit of a doubt. This conceded, How can it be said that the adoption of the constitution of 1868 was not the act of the people of Georgia? The courts cannot do otherwise than regard it as such. This is a

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political question in which the courts must follow the action of the political department of the government. To adopt any other course would be to introduce the greatest confusion. Congress, as was its right, regulated the elective franchise. There was no other legal authority to do it. The executive had no such authority. The state government of Georgia was a mere provisional one, and could not legally do it. No interference with the freedom of elections was interposed; on the contrary, the general government took measures to prevent any such interference. All that congress had to do, in relation to the constitution, when the state applied for readmission, was to impose certain conditions, to wit: That certain unwise clauses should be left out of the constitution, and that the legislature should ratify the fourteenth amendment. This was done. But Georgia was not compelled to do it. She could do as she pleased. It was at her own option. How can this possibly make the constitution an act of congress, or tantamount to such an act?

Then, is a provision in a state constitution which impairs the obligation of a contract void? I have no doubt on the subject. A state can no more pass a law violating a contract, by means of a convention than it can by means of a legislature; and a constitution adopted by a state, either after its admission, or with a view to its admission or readmission into the Union, must be regarded as a law of the state, and amenable to the prohibitory clauses of the constitution of the United States.

Then, looking at the constitution of 1868, Does the clause relied on impair the obligation of a contract? The first part, of the clause, which declares void all contracts made in aid of the rebellion, only expresses what would be the law without any declaration on the subject. The second part, which avoids the instruments in whosoever hands they may come, when applied to such instruments as bank bills, is more questionable. But the final portion, which throws the burden of proof on the plaintiff to show that the bills have never been used in aid of the rebellion, if only the defendant will swear that he has reason to believe that they were so used, imposes upon the plaintiff

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iff an impossibility, and is tantamount to destroying the contract on the simple oath of the defendant as to his belief. I cannot think that such a provision is constitutional.

5. But the defendants make still another point, namely: that they have severally redeemed their shares of the bills of the bank, and have them ready to show as offsets to their liability as stockholders. This part of the answer relates only to the personal liability of all stockholders for the debts of the bank, under the fifteenth section of the charter, and not to their liability for unpaid subscriptions to stock. But, supposing the answer was right in form, could the defendants set up this defense to the bill? They do not show how they procured the bills. They have not recovered judgment on them. They may be unable to do so. The bills they hold may be open to the very objections they raise against the bills held by the complainants. They would not be permitted to pay up their subscriptions, if called on by the bank, in its old, depreciated currency. The most they can do with these bills, it seems to me, is to present them to the receiver for their *pro rata* share of the assets of the bank; or, if they can recover judgment on them, to pursue the course which has been pursued by the complainants, if it is competent for them to sue other stockholders when they themselves are owing the bank.

For these reasons, I think a decree must be made in favor of the complainants, the form of which, on reflection, I think should be that the defendants should severally pay to the complainants the amounts due by them for unpaid stock, so far as may be necessary to satisfy the amount of the complainants' judgments, interest and costs. It was suggested that those who had paid the least per centage on their stock should be first called upon, but I think all are equally liable to pay what they have not paid on their subscriptions; and, although the directors might be required to pursue that order, I do not think the court is bound to follow the directions marked out for the directors. It was also suggested that the decree should be based on a settlement and distribution of the fund in the hands of the receiver, and should make the defendants liable only

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for such balance as might be due to the complainants after receiving their share of that fund ; but this would postpone the complainants indefinitely, and it seems to be generally conceded that the assets in the receiver's hands are not sufficient to pay the other creditors.

Decree for the complainants.

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**LATHROP VS. BROWN.**

The act of the legislature of Georgia, approved October 18, 1870, which provided that in all suits brought in any court of the state, founded on any debt or contract made before June 1, 1865, or in renewal thereof, the plaintiff should not have verdict or judgment unless the court was satisfied that all taxes upon said debt or contract had been paid for each year since the incurring or making thereof, and that in every trial upon such debt or contract, the fact that the same had been legally returned for taxes, and the taxes paid thereon, should be a condition precedent to a recovery ; impairs the obligation of contracts and is therefore unconstitutional and void.

This cause was tried upon demurrer to a plea in bar.

*Mr. Edward J. Harden*, for plaintiff.

*Mr. Frank S. Hesseltine*, for defendant.

BRADLEY, Circuit Justice. This is an action brought by Harvey W. Lathrop, a citizen of Maryland, against David M. Brown, upon a promissory note dated January 1, 1862, whereby one Jacob L. Riley, as principal, and Brown as surety, promised by the first of January then next to pay to John W. McLeod, or bearer, \$2,280.50 for value received. Two thousand dollars were paid on the note December 8, 1865. The suit is brought for the balance. The defendant, amongst other things, pleads that the contract was made prior to the 1st of June, 1865, and that by a statute of Georgia, of the 18th of October, 1870, it was enacted that in all suits brought in or before any court of the state, founded on any debt or contract made before the 1st

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**The United States vs. A Tract of Land.**

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of June, 1865, or in renewal thereof, it should not be lawful for the plaintiff to have a verdict or judgment in his favor until he had made it clear to the tribunal trying the same, that all legal taxes chargeable by law upon the same had been duly paid for each year since the making of said debt or contract. And further: In every trial upon a suit founded upon any such contract, it is provided that said debt has been legally given in for taxes, and the taxes paid shall be a condition precedent to a recovery on the same; and in every such case, if the tribunal trying is not clearly satisfied that said taxes have been duly given in and paid, it shall so find; and said suit shall be dismissed; and defendant avers that the causes of action in the declaration mentioned were chargeable with taxes, which have not been given in or paid.

The plaintiff demurs to this plea. The question is, whether said statute is constitutional, and I am clearly of the opinion that it is not. It imposes upon the plaintiff conditions for a recovery which were not required to be performed when the contract was made — conditions onerous, and if he has not paid the taxes, impossible to be performed. It imposes a penalty and forfeiture for nonpayment of taxes, which it is conceded did not exist when the taxes were assessed and payable. It therefore impairs the validity of contracts. Restrictions on the remedy which materially affect a contract tend as much to impair its validity as laws passed to abrogate it. They differ only in degree. I have no hesitation or doubt on the subject.

Judgment for plaintiff.

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**THE UNITED STATES VS. A TRACT OF LAND.**

Land conveyed to the Confederate States government, for the purpose of aiding the rebellion, became the property of the United States by right of conquest, *ipso facto*, and no proceedings were necessary for confiscation or forfeiture, and when such proceedings were taken, they were void.

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Jarrell's Assignee vs. Harrell and others.

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ERROR to the District Court.

One Titus filed a petition in the district court as informer, claiming one-half the proceeds of lands seized and sold in the principal case. The court awarded judgment in his favor. This is a writ of error to reverse that judgment.

*Mr. John D. Pope*, U. S. Attorney, for the United States.

*Mr. Henry R. Jackson*, for the informer.

BRADLEY, Circuit Justice. The land in question in the cause was seized for confiscation under the acts of August 6, 1861 (12 Stat., 319), and July 17, 1862 (12 Stat., 589). The information alleges that it had been conveyed to the Confederate States government for the purpose of aiding the insurrection. If this were the case, it became the property of the United States government by right of conquest, *ipso facto*; that government succeeding to all the property held by the Confederate States government. The United States needed no proceedings for confiscation or forfeiture. They had plenary title and right of possession, if not actual possession, without any such proceedings. It cannot be presumed that congress intended to authorize a proceeding to forfeit or confiscate the government's own property, and divide the proceeds with the informer. Such a proceeding must be regarded as supererogatory and void.

The judgment is reversed.

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JARRELL'S ASSIGNEE VS. HARRELL and others.

A person contemplating insolvency conveyed his property to another, in fraud of the bankrupt act, the grantee having notice of and participating in the fraud. After the appointment of an assignee in bankruptcy, the grantee conveyed the same property to a third person: *Held*, that if such third person were a *bona fide* purchaser, without notice of the fraud, his title was good as against the assignee.

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Jarrell's Assignee vs. Harrell and others.

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## IN EQUITY.

This bill was filed by the assignee in bankruptcy of one Jarrell, to have declared void certain sales and conveyances of the bankrupt's property alleged to have been made in fraud of the bankrupt act, and for the purpose of defrauding the creditors of the bankrupt, amongst others, a sheriff's deed to one Echols for a lot of 1,640 acres, known as the Snelling place, and a deed from the bankrupt to the said Echols for another lot of 680 acres, called the Perry place. The sheriff's sale took place October 1, 1867, and the conveyance of the Perry place October 7, 1867.

The evidence clearly established the facts that the conveyances to Echols were fraudulent, and that Echols had knowledge of the insolvency of Jarrell and of his fraudulent purpose in making the conveyance.

The defendant Harrell purchased the property from Echols about a year after the conveyance to the latter, and after the complainant had been appointed assignee of the bankrupt. Harrell claimed that whatever might have been the character of the original sales, he was a *bona fide* purchaser, without notice of the fraud, and this claim of Harrell presented the only real question in the case.

*Mr. R. F. Lyon*, for plaintiff.

*Messrs. H. R. Jackson and Willis A. Hawkins*, for defendant.

BRADLEY, Circuit Justice. It is contended on behalf of the complainant, that this plea cannot avail the defendant, however well sustained by proof; that the assignee, as soon as he was appointed, became entitled to the property, and no subsequent conveyance of it by Echols could give a title as against the assignee. I cannot yield to this suggestion. An assignee has no better right than any judgment creditor would have, to take the property out of the hands of a *bona fide* purchaser without notice.

The real question is, Was Harrell a *bona fide* purchaser without notice?

The court then went into an elaborate examination of the

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**In re Smith, a bankrupt.**

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evidence on this point, and reached the conclusion that the facts known to Harrell were sufficient to put him on notice of the fraudulent character of the title of Echols. A decree was therefore rendered for complainant.

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**In re SMITH, a Bankrupt.**

**An omission to include all his property in his schedule is not of itself cause for refusing a bankrupt his discharge. The omission must be for the purpose of concealment, or to mislead or defraud.**

This was a petition of review, filed under the second section of the bankrupt act, for the reversal of an order of the district court.

*Mr. H. R. Jackson*, for petitioner.

*Mr. F. S. Hesseltine*, for respondent.

**BRADLEY, Circuit Justice.** The petitioner asks for a reversal of the decree of discharge, because the district court overruled and disregarded a report of the register as to certain proceedings had before him, in which the creditor objected to the discharge, and desired a trial on the subject.

If a creditor objects to the discharge of a bankrupt, the 31st section of the bankrupt act requires that he should file a specification in writing of the grounds of his opposition, and enacts that the court may, in its discretion, order any question of fact so presented to be tried at a stated session of the court. The 24th general order requires the creditor to file his specification of the grounds of his opposition, in writing, within ten days after the time for showing cause, and directs that the court shall thereupon make an order as to the entry of said case for trial, etc.

Supposing that the objections to the discharge in this case were properly filed, an examination of them, as certified by the register, shows that they could not, if fully sustained, have prevented the bankrupt's discharge. The specification is, that

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In re Smith, a bankrupt.

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the schedule filed by him did not contain a full and complete statement of the property owned by him at the time of filing his petition; the following items not being contained therein, to wit: one tract of land, etc., (describing it, together with other property also described).

An omission to include all his property in his schedule is not, of itself, cause for refusing a bankrupt his discharge. It must be done for the purpose of concealment, or to defraud, or to mislead. There must be false swearing, or some other of those delicts which are enumerated in the law as grounds for refusing a discharge. They are enumerated in the 29th section of the bankrupt act. A mere omission of property is not one.

The parties have sent up to the court a statement of facts alleged on the one side and the other, in reference to the matter specified; but it does not aid the objection, but rather shows that the debtor had an excuse, if not an entire justification, for the omission. It seems that the property omitted was, in 1865, decreed to be conveyed to a trustee for the benefit of the bankrupt's wife. The creditor alleges that that decree was obtained by the procurement of the bankrupt, and was in fraud of creditors. It certainly could not have been procured in contemplation or in fraud of the bankrupt law, for it was rendered two years before the passage thereof. It raises an issue entirely distinct from and collateral to the the issue in this case, and one that the assignee may well be justified in subjecting to a legal investigation. It is very possible that the assignee may recover the property, and employ it for the benefit of the creditors. But it must, at least, be conceded, that there was a plausible excuse for its omission from the schedule, and that a fraud in the procurement of that decree does not necessarily imply deceit in the omission of the property from the schedule. And as no perjury is charged against the bankrupt, nor any design to conceal the property, but the omission alone is relied on for preventing a discharge, I think the district judge was justified in overruling the objection, and refusing an issue.

The decree is affirmed.

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The United States vs. Carr.

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NOVEMBER TERM, 1872.

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THE UNITED STATES VS. CARR.

(Before Woods and ENSKINE, JJ.)

1. The willful killing of a soldier by the sergeant of the guard, while on duty, is not necessarily a justifiable homicide.
2. The order of a superior military officer to an inferior will not, of itself, justify the willful killing of another.
3. A soldier is bound to obey only the lawful orders of his superior officers.
4. In the suppression of a disorder or mutiny among soldiers, the means used should be proportioned to the end to be gained. Violent measures, clearly unnecessary, will not be justified. But officers, charged with the good order of a camp or fort, will not be required to weigh with scrupulous precision the exact amount of force necessary to suppress disorder.
5. No mere words, applied by one man to another, will justify the use of a deadly weapon; nor can they be the lawful occasion of that "heat" which would reduce the act of killing from murder to manslaughter.

Robert E. Carr was indicted and tried, at the November term, 1872, of the circuit court for the southern district of Georgia, for the willful murder of Harmon A. Jordan. The case was this: Both the prisoner and the deceased were soldiers in the 8d artillery, United States army, and were stationed at Fort Pulaski, on Cockspur Island, near the mouth of the Savannah river, in Georgia. On the 13th of July, 1872, the prisoner was the sergeant of the guard at the fort. About seven o'clock in the evening, a drunken quarrel occurred between some of the soldiers in the fort. Sergeant Bell, attempting to suppress the disorder, was taking Corporal McKinley to the guard house, when he was set upon by other soldiers and knocked down and left insensible upon the ground. A call was then made for the sergeant of the guard. The prisoner and three men of the guard at once crossed the parade to the scene of the disorder. The prisoner gave Sergeant Shirer, who was one of the disorderly soldiers, in charge of two men of the guard to convey him to the guard house. Shirer had lost his

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The United States vs. Carr.

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cap, and, when he asked leave to get it, the prisoner struck him with the butt of his musket and knocked him down. At this point, the deceased approached the prisoner and said to him, "You are a mean man," or "you are a damned mean man to knock a man down in that way." The prisoner then made an attempt to run his bayonet into deceased, who avoided the thrust, and turned and commenced running toward his quarters. Prisoner raised his piece to fire. It was at half-cock. He brought it down, cocked it, raised it again, and fired at deceased, who was at the time running from prisoner toward his quarters. The ball entered the back of deceased near the spine, passed through his body, coming out near the left nipple; passed through his left elbow and then struck the wall of the fort beyond. At the time he was shot, the deceased was eight or ten yards from prisoner. He died in about ten minutes.

It was a disputed question of fact, upon the trial, whether the deceased was engaged in, or was trying to suppress, the disorder among the soldiers at the time the prisoner came up. There was also some evidence tending to show that the musket of the prisoner was discharged accidentally and not purposely, and that prisoner acted under the orders of the ranking sergeant in the fort. There was no commissioned officer within the fort at the time of the homicide.

*Mr. George S. Thomas, Asst. U. S. Att'y, for the prosecution.*

*Messrs. Julian Hartridge and M. J. O'Donohue, for the defense.*

WOODS, Circuit Judge, charged the jury as follows:

The prisoner stands at the bar of this court charged with the crime of willful murder. The indictment is based upon the third section of the act of congress, approved April 30, 1790 (1 Stat., 113), which reads as follows:

"That if any person or persons shall, within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the sole and exclusive jurisdiction of the United States, commit the crime of willful murder, such person or persons on conviction thereof shall suffer death."

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The United States vs. Carr.

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It charges that the prisoner, on the 13th of July, 1872, at and within Fort Pulaski, on Cockspur Island, within the southern district of Georgia, the said fort being at that time under the sole and exclusive jurisdiction of the United States, did, upon the person of one Harmon E. Jordan, commit the crime of willful murder by shooting him with a musket. To this indictment the prisoner has pleaded not guilty, and has put himself upon the country.

He comes to the bar under the protection of that humane maxim of the law, that every man is presumed to be innocent until the contrary is shown. In other words, the burden of proof is on the United States to establish the prisoner's guilt. Until this is done, in the eye of the law he is innocent. The prosecution must prove to your satisfaction every material ingredient of the offense of willful murder, before you would be justified in returning a verdict of guilty.

Counsel for prisoner do not deny that on the 13th of July last at Fort Pulaski, within the southern district of Georgia, Harmon E. Jordan was killed by a shot fired from a musket held in the hands of the prisoner. Nor do they deny that the United States has sole and exclusive jurisdiction over Cockspur Island, on which Fort Pulaski is situate. There is therefore no question raised as to the jurisdiction of this court to try the accused.

It is not every killing of a human being that is criminal. Many homicides are of such a nature as to be no crimes at all. This makes it necessary for the court to instruct you what constitutes the crime of willful murder as known to the law.

Murder is defined to be "when a person of sound memory and discretion unlawfully killeth any reasonable creature in being and under the king's peace, with malice aforethought, express or implied." 3 Coke's Inst., 47.

In the case on trial it is not denied that the deceased, Harmon E. Jordan, was killed by a musket ball fired from a musket held in the hands of the prisoner, nor is it denied that the prisoner was of sound memory and discretion at that time, nor that Jordan was under the peace and protection of the law, so

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The United States vs. Carr.

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that the willful killing of him would be a crime. Therefore, according to the definition just quoted, the only points for you to pass upon in deciding whether the prisoner at the bar is guilty of murder are: *first*, Was the killing unlawful? and *second*, Was it done with malice aforethought, express or implied?

Upon the point whether or not the killing was unlawful, you will first enquire whether the act of the prisoner which resulted in the death of Jordan was intentional or unintentional. If it was unintentional, if the prisoner had no purpose to fire his piece, but it was discharged by him accidentally, and at the time of its discharge the prisoner was engaged in no unlawful act, then the act of killing is a homicide by misadventure, and is no crime. Therefore, if you shall be of opinion that the musket of the prisoner was accidentally discharged, and he was at the time engaged in no unlawful act, it would be your duty without further inquiry to return a verdict of not guilty. If, however, on the other hand, you believe the prisoner discharged his piece purposely, you will then inquire further whether the killing was lawful or unlawful.

The simple fact, if such you find to be the fact, that the prisoner, on the 13th of July last, was sergeant of the guard at Fort Pulaski, and the deceased was at the same time and place a private soldier, does not of itself make the killing a lawful homicide. The willful killing of a soldier by a guard may be as clearly murder as the willful killing of one citizen by another.

Nor will any order of a superior officer to an inferior in rank justify the willful killing of a person under the peace and protection of the law. A soldier is bound to obey only the lawful orders of his superiors. If he receives an order to do an unlawful act, he is bound neither by his duty nor his oath to do it. So far from such an order being a justification, it makes the party giving the order an accomplice in the crime. For instance, an order from an officer to a soldier to shoot another for disrespectful words merely would, if obeyed, be murder, both in the officer and soldier.

It was the duty of the prisoner as officer of the guard to pre-

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serve the peace within the fort, and to suppress disorderly and mutinous conduct. He was authorized to use all proper and reasonable means to accomplish this end. But the means used and the force applied should be measured by the necessity of the case. For instance, the law would not justify the killing of a single unarmed soldier, even though drunken, riotous or even mutinous, when he could be arrested without resort to such extreme means. The means used must be proportioned to the end to be accomplished. In order to determine whether the homicide, now under investigation, was lawful or unlawful, you should consider what, under the circumstances of the case, would appear to a reasonable man to be the demands of duty. Place yourselves in the position of the prisoner at the time of the homicide. Inquire whether at the moment he fired his piece at the deceased, with his surroundings at that time, he had reasonable ground to believe and did believe that the killing or serious wounding of the deceased was necessary to the suppression of a mutiny then and there existing, or of a disorder which threatened speedily to ripen into mutiny. If he had reasonable ground so to believe, and did so believe, then the killing was not unlawful. But if on the other hand, the mutinous conduct of the soldiers, if there was any such, had ceased, and it so appeared to the prisoner, or if he could reasonably have suppressed the disorder without the resort to such violent means as the taking of the life of the deceased, and it would so have appeared to a reasonable man under like circumstances, then the killing was unlawful. But it must be understood that the law will not require an officer charged with the order and discipline of a camp or fort to weigh with scrupulous nicety the amount of force necessary to suppress disorder. The exercise of a reasonable discretion is all that is required.

If you shall reach the conclusion under these instructions that the homicide under consideration was lawful, it will be your duty without further inquiry to return a verdict of *not guilty*. If however you shall be of opinion that the killing was unlawful, you will then proceed to inquire whether it was attended with malice aforethought, express or implied. "Mal-

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ice aforethought is the grand criterion which distinguishes murder from other homicide, and it is not so properly spite or malevolence to the deceased in particular, as any evil design in general; the dictate of a wicked, depraved and malignant heart; a purpose to do a wicked act, and it may be either express or implied in law. Express malice is when one with a sedate, deliberate mind and formed design doth kill another, which formed design is evidenced by external circumstances discovering that inward intention, as lying in wait, antecedent injuries or former grudges, and concerted schemes to do him some bodily harm. So in many cases, when no malice is expressed, the law will imply it, as when a man willfully poisons another; in such a deliberate act the law presumes malice, though no particular enmity can be proved. And if a man kills another suddenly, without any, or without a considerable provocation, the law implies malice; for no person, except of abandoned heart, would be guilty of such an act upon a slight or upon no apparent cause." 4 Black. Com., 198.

"Although the malice in murder is what is called malice aforethought, yet there is no particular period of time during which it is necessary it should have existed, or the prisoner should have contemplated the homicide. If, for example, the intent to kill or do other great bodily harm, is executed the instant it springs into the mind, the offense is as truly murder as if it had dwelt there for a long period." 2 Bishop on Crim. Law, sec. 677.

If you are satisfied that the prisoner at the bar when he fired upon the deceased intended not to kill him, but only to do him some great bodily harm, if his act was unlawful and was done with malice aforethought, as it has been explained to you, still he is guilty of murder.

A recent act of congress declares that in all criminal causes the defendant may be found guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment. Section 9, act of June 1, 1871 (17 Stat., 198). We instruct you that the crime of manslaughter is included in the crime of willful murder, with which the pris-

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oner is charged in the indictment. So that if after a careful investigation, you should conclude that the prisoner is not guilty of willful murder, you may still find him guilty of manslaughter.

“Manslaughter is defined to be the unlawful killing of another without malice, express or implied, which may be either voluntarily upon a sudden heat, or involuntarily, but in the commission of some unlawful act.” 4 Black. Com., 191.

If you shall be of opinion that the killing of the deceased was unlawful, you must decide whether the offense of the prisoner is murder or manslaughter.

It is not claimed in this case that the firing of the prisoner's musket was done involuntarily while the prisoner was in the commission of an unlawful act. So that if the prisoner is guilty of manslaughter at all, it must be because he is guilty of a killing voluntarily upon a sudden heat.

No words applied by one man to another will justify the use of a deadly weapon, nor can they be the lawful occasion of that “heat” which would reduce the act of killing from murder to manslaughter. If a man returns provoking language by a blow from an instrument calculated to produce death, and death follows, the act will be murder. *State v. Merrill*, 2 Devereau, 269; 1 Bishop Crim. Law, sections 872, 873.

If you find the killing of the deceased was unlawful, but without malice, as we have defined malice, if it was done upon a sudden heat, not caused by the words merely of the deceased, but by an assault, then the prisoner is guilty of manslaughter and not of murder, and such should be your verdict.

Before you can find the prisoner guilty of either murder or manslaughter, you must be satisfied beyond reasonable doubt, that every ingredient necessary to the offense has been established by the proof. A reasonable doubt is not a remote and far fetched or fanciful doubt. It must be suggested by the evidence in the case, and of such strength as would influence a reasonable man in the conduct of his own affairs.

If you are satisfied beyond any reasonable doubt of the guilt of the prisoner of either murder or manslaughter, you will

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**Alston vs. Cohen.**

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return a verdict of guilty accordingly. If on the other hand you are convinced of the prisoner's innocence, or have reasonable doubt of his guilt, it will be your pleasant duty to say, Not guilty.

In your retirement, remember the great magnitude of this case to the public and the prisoner; bring your best ability to bear upon the investigation, and acquit yourselves of your solemn duty like good and lawful men.

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**ALSTON VS. COHEN.**

1. An executor or administrator is the trustee and proper representative of all persons interested in the personal estate, and until the final distribution of the estate, holds both the legal and equitable title thereto.
2. Consequently, when he is made a party to a bill filed by a distributee to sell the personal property of an estate and divide its proceeds, the other distributees are not necessary parties.

**IN EQUITY.** Submitted on demurrer to the bill for want of equity.

*Mr. Jos. P. Carr*, for complainant.

*Mr. W. H. Hull*, for defendant.

**WOODS, Circuit Judge.** The bill alleges in substance that complainant is the widow of Joseph Alston, Jr., formerly a citizen of South Carolina, but at his death a resident of New York, who died in April, 1861, intestate, seized and possessed of a large real and personal estate, and leaving his aunt Sarah, wife of John Izard Middleton, his aunts Charlotte M. Alston, Anna L. Alston, Mary Ashe, wife of Leaman Deas and the complainant, as his next of kin and distributees.

That by the law of South Carolina, upon the death of said Joseph Alston, two-thirds of his real and personal estate descended to complainant and the remaining one-third was divisible among the said aunts of the deceased. That said John Izard Middleton took out letters of administration on the

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estate of Alston in Georgetown district, South Carolina, took possession of the same and paid all the debts.

That in the spring of 1863, Leaman Deas and Mary Ashe, his wife, brought their bill in equity in the Charleston district against John Izard Middleton and Sarah his wife and the other distributees, except complainant, praying an account, sale, partition and distribution of the said estate. That the court made an order in 1863 directing a sale of all the personal estate of said Joseph Alston. That James Tupper, one of the masters of the court, in pursuance of said order, on November 25, 1863, sold certain bonds and shares of capital stock particularly described in the bill. That defendant became the purchaser thereof for the price named in the bill, and took possession of and appropriated the same to his own use.

The proceeds of this sale were divided among the other heirs and distributees to the exclusion of the complainant, or invested in bonds of the Confederate States which have become wholly valueless, and are now in possession of said master or his successor in office.

Complainant claims that as she was in no way a party to the said bill, her right to a share of the bonds and stocks can in no way be affected by the decree, that the master could only by the sale transfer the right, title and interest of the parties before the court, and that the purchaser became a tenant in common with complainant, or by taking possession of the bonds, has become a trustee for complainant, and is bound to account to her therefor.

The bill prays that defendant may be required to transfer to complainant two-thirds of the bonds and stocks so purchased by him, or to account for two-thirds of their value.

The defendant has filed a demurrer to the bill for want of equity. I think the demurrer is well taken.

The question to be solved is this: Was the complainant bound by the proceedings and decree in the case in equity in the Charleston district? If she were a proper and necessary party she is not bound, but if otherwise, if her interests were represented by a party before the court, she is

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Hargrave vs. Creighton.

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The general rule is, that inasmuch as the executor or administrator is the trustee and proper representative of all persons interested in the personal estate, and has a duty cast upon him of protecting it against improper demands, it is not necessary or proper to join either a pecuniary or residuary legatee or the next of kin as a party to a bill against an executor or administrator for an account of the personal estate, however interested such person may be to contest the demand which has occasioned the suit. 2 Wms. on Ex'rs, 1729; *Brown v. Dowthwaite*, 2 Madd., 446.

Until the final distribution of an estate, the administrator has both the legal and equitable title to the personalty. If therefore, the administrator is a party to a bill asking a sale and distribution which is ordered, the purchaser at the sale takes the title of the administrator.

The administrator of Alston was a party to the bill before the Charleston chancery court. He held the title to the personal estate, and was the proper representative of all persons interested therein. A decree to which he was a party ordering a sale, and a sale made in pursuance of such decree therefore, conveyed his title to Cohen, the purchaser. If Cohen acquired title the complainant has no claim upon him, either as tenant in common with her or as trustee.

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APRIL TERM, 1873.

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## HARGRAVE VS. CREIGHTON.

Where a contract for the payment of money is made in one country, payable in the currency of that country, upon suit brought in another country to recover for breach of the contract, the plaintiff ought to recover such a sum in the currency of the country where the suit is brought, as would be equivalent to the sum to which he would be entitled in the country where the debt is payable, calculated by the real and not the nominal par of exchange.

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Hargrave vs. Creighton.

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This case was submitted *pro forma* to a jury. The only question was upon the amount of the verdict. The point and the opinion of the court upon it will appear in the observations of the judge which follow.

*Mr. Henry R. Jackson*, for plaintiff.

*Mr. R. E. Lester*, for defendant.

WOODS, Circuit Judge. This action is founded on several bills of exchange. The following is a copy of one of them:

“£166. 13. 4.

MANCHESTER, May 2, 1870.

Nine months after date, pay to our order one hundred and sixty-six pounds, thirteen shillings and four pence, for value received.

GEO. J. HARGRAVE & Co.

To Messrs. HUGH CREIGHTON & Co, 883 Belfast.

Payable in London.”

The other bills are similar, saye in amount and time of payment.

The bills show that the contracts were made and were to be performed in England. It is admitted that the verdict must go for the plaintiff. The only question controverted is, What ought to be the amount of the verdict? Upon this point plaintiff has introduced the testimony of a witness, who swears that it would require the sum of six thousand and fifty-three dollars and forty-nine cents, to purchase a bill of exchange on London for £1078. 16. 9. This is 26½ per cent. more than the face value of the bills sued on, and is made up partly in exchange and partly in the premium on gold.

The plaintiff claims that he is entitled to this 26½ per cent., and the defendant denies it.

The question whether, in a case similar to this, the plaintiff would be entitled to exchange, has been decided adversely to the claim in the courts of New York. Thus in *Scofield & Taylor v. Day & Gelston*, 20 Johns., 102, where a promissory note was drawn at Montreal, in the British Province of Lower Canada, payable to parties residing in England, it was held, that in a judgment obtained on a note in a court of the state

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Hargrave vs. Creighton.

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of New York, the plaintiffs were not entitled to any allowance for the current rate of exchange in England at the time of the judgment.

So in *Marvin v. Franklin*, 4 Johns., 124, it was held, that when a person in New York purchases goods in England, and is sued here, the creditor can recover the amount at the par of exchange only, and is not entitled to any allowance for the rate of exchange, or for the price of bills on England. The court said, "the debt is to be paid according to the par and not the rate of exchange. It is recoverable and payable here to the plaintiffs or their agent, and the courts are not to inquire into the disposition of the debt after it reaches the hands of the agent."

The same doctrine was held in *Adams v. Cordis*, 8 Pick., 260, as the proper rule in all cases, except bills of exchange.

On the other hand, Mr. Justice STORY says (Confl. of Laws, secs. 308, 309, 310): "When a contract is made in one country and is payable in the currency of that country, and a suit is afterwards brought in another country to recover for the breach of the contract, a question often arises as to the manner in which the amount of the debt is to be ascertained, whether at the nominal or established par value of the two currencies, or according to the rate of exchange at the particular time existing between them. The proper rule would seem to be, in all cases, to allow that sum in the currency of the country where the suit is brought which should approximate most nearly to the amount to which the party is entitled in the country where the debt is payable, calculated by the real par and not the nominal par of exchange. In all cases, we are to take into consideration the place where the money is, by the original contract, payable; for, wheresoever the creditor may sue for it, he is entitled to have an amount equal to what he must pay in order to remit it to that country. Thus, if a note were given in England for £100, payable in England, or, what is the same thing, payable generally, then, in a suit in Massachusetts, the party would be entitled to recover, in addition to the four hundred and forty-four dollars and forty-four cents, the rate of ex-

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Hargrave vs. Creighton.

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change between Massachusetts and England, which is ordinarily from eight to ten per cent. above par. If the exchange were below par, a proportionate reduction should be made, so that the party would have his money replaced in England at exactly the same amount he would be entitled to receive in a suit there."

In *Cash v. Kennion*, 11 Ves., 314, Lord ELDON held that if a man in a foreign country agrees to pay £100 in London upon a given day, he ought to have that sum there on that day, and if he fails in that contract, wherever the creditor sues him, the law of that country ought to give him just as much as he would have had if the contract had been performed.

Mr. Justice WASHINGTON, in the case of *Smith v. Shaw* (2 Wash., 167), in a suit brought by an English merchant on account for goods shipped to the defendant's testator, where the money was doubtless to be paid in England, and the question was made, whether, it being a sterling debt, it should be turned into currency at the par of exchange, or at the then rate of exchange, held that the debt was payable at the then rate of exchange. See also, *Grant v. Healy*, 3 Sumner, 523; *Dungannon v. Hackett*, 1 Eq. Cas. Abr., 238; *Ekins v. East India Co.*, 1 P. Wms., 395.

It seems to me, not only that the weight of authority, but the weight of reason is with the plaintiff on this question. The defendants agree to pay their debt to the plaintiffs on a day certain, in London. They break their contract, and remove to America, where the plaintiffs are compelled to follow them. Is not the plaintiff entitled to the same fruits of his contract at the hands of a court of justice as if the contract had been kept? And ought the defendants to be allowed, by breaking their contract, to make it any the less valuable to the plaintiff, and ought they to derive benefit from their own wrong in violating their promise by being allowed to pay their debt in a cheaper currency than would have been required had they kept their contract?

These questions, it seems to me, should be answered in the negative.

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**Varner vs. West.**

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The legal tender act cannot affect this question: The point is, What is due from the defendants to the plaintiff on their contract? When that is ascertained, the amount is solvable in currency.

Let the verdict be for \$6,053.49, the amount claimed by plaintiffs.

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**VARNER VS. WEST.**

1. When want of jurisdiction appears upon the face of the pleadings, the objection should be taken by demurrer, when it does not so appear, by plea.
2. The United States circuit court has jurisdiction of a suit brought against a citizen of the state in which the court is held, by a citizen of another state, upon a note payable to it or bearer, notwithstanding the note may have been indorsed to the plaintiff by payee, and although the declaration contains no averment that the payee could have sued.
3. After dishonor, a promissory note does not lose its character as such, nor cease to be a negotiable instrument. The only effect of the dishonor is to let in the defenses of the maker as against the payee.

Submitted on motion to dismiss because the declaration failed to show that the court had jurisdiction.

*Mr. R. F. Lyon*, for plaintiff.

*Mr. Henry R. Jackson*, for defendant.

WOODS, Circuit Judge. The declaration contains two counts. The first alleges in substance that on the 3d of November, 1860, the defendant made his promissory note of that date, whereby he promised to pay on January 1, 1862, to S. D. Durham or bearer, two thousand five hundred dollars; that afterwards, on the 17th day of August, 1869, the said Durham transferred and delivered the note by indorsement for value received to the plaintiff, who then became and still remains the legal owner and bearer thereof. Appended to this count is a copy of the note and of the indorsement, the latter of which is in these words: "I indorse the within note to Joseph W. Var-

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ner, of Arkansas, for value received, August 17, 1869. S. D. DURHAM."

The second count, which was filed as an amendment to the declaration, and by leave of the court, recites the making of the note as in the first count, and then avers that "the said S. D. Durham, to whom, or to the bearer thereof said note was made payable afterwards, to-wit, on the 17th day of August, A. D. 1869, transferred said promissory note in due course of trade, and for a valuable consideration, to plaintiff by delivery, who thereby became the legal owner and bearer thereof."

To this declaration the defendant pleaded the general issue and other pleas in bar, and on the calling of the cause for trial, made the motion to dismiss the case because the jurisdiction of the court does not appear upon the face of the declaration.

We do not think that a motion to dismiss is the proper method by which to take advantage of the defect alleged to exist in this declaration. It is true that a court will at any stage dismiss a cause when it is made to appear that it has no jurisdiction; but the fact that jurisdiction does not appear on the face of the declaration is not conclusive evidence that the court has not jurisdiction. The plaintiff, by amendment of his declaration, might be able to show clearly that the court had jurisdiction. When want of jurisdiction appears on the face of the pleading, the objection should be taken by demurrer; when not, then by plea. If we should be of opinion that the declaration does not show the jurisdiction of the court, we would allow the plaintiff to amend and show the jurisdiction. We have, however, considered and will dispose of the question raised by this motion.

The 11th section of the "act to establish the judicial courts of the United States," approved September 24, 1789 (1 Stat. 79), declares as follows: "Nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless the suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange."

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This makes it necessary to state on the record the citizenship of the payee of a negotiable note sued on by an indorsee. *Turner v. Bank of North America*, 4 Dall., 8; *Rogers v. Linn*, 2 McLean, 126.

But where a note is payable to A. B. or bearer, the circuit court has jurisdiction to enforce payment in favor of a holder who is a citizen of another state, although it is not shown that A. B. is a citizen of another state; the prohibition of section 11 of the judiciary act not applying to such a note. *Bullard v. Bell*, 1 Mass., 243. Or as expressed in *Smith v. Clapp*, 15 Pet., 127, "an assignment of a note payable to bearer by delivery only, without indorsement, is not within the 11th section of the judiciary act, and it is not necessary to aver the citizenship of the assignor."

But it is insisted in this case that the declaration shows that the note sued on, though payable to S. D. Durham or bearer, was in fact indorsed by Durham, the payee named in the note, and so indorsed, was delivered by him to the plaintiff, and that this fact brings the case within the prohibition of section 11 of the judiciary act. In reply to this we observe that the plaintiff in his second count declares upon the note, as bearer, and ignores the indorsement by Durham. We think the plaintiff under the circumstances might elect to treat the note either as transferred to him by indorsement or by mere delivery. In his second count he has elected to treat the note as transferred to him by delivery merely, and so treating it, it was not necessary to make any averment touching the citizenship of Durham, and the case does not fall within the prohibition of the 11th section of the judiciary act. In the case of *Young v. Bryan*, 6 Wheat., 146, it was held by MARSHALL, C. J., "that a suit may be brought in the circuit court by the indorsee against the indorser, whether a suit could be then brought against the drawer or not. In such a case the indorser does not claim through an assignment. It is a mere contract entered into by the indorser and indorsee, upon which the suit is brought." So in the case at bar, the holder and bearer of the note may rely upon the contract between himself and the maker of the note, or he may

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**Zerega & Scott vs. McDonald.**

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elect to derive his rights through the indorsement of the party named in the note as payee. The fact that the holder has two distinct titles to the note ought not to prejudice either of them. It was claimed in argument that the promise of the maker of a note payable to bearer was to pay the party who at the maturity of the note happened to be the bearer, and that after the note was dishonored by nonpayment, it ceased to be a promise to pay, and the holder had only a right to sue for damages as upon a contract broken.

The authorities are adverse to this proposition. After dishonor, a promissory note or bill of exchange does not lose its character as such, nor does it cease to be a negotiable instrument. The only effect of the dishonor is to let in defenses of the maker as against the payee. Bailey on Bills, ch. 5, sec. 3, p. 166.

We are of opinion that the declaration as amended shows a case within the jurisdiction of this court, and that the motion to dismiss for want of jurisdiction, must be overruled.

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**ZEREKA & SCOTT VS. McDONALD.**

1. Under the local law of Georgia, no attachment lies for the recovery of unliquidated damages consequent upon the breach of a contract.
2. And when from the answer of the garnishees, it appears that there are no debts due the defendants in attachment in the county where the proceedings are commenced, and none of their property is siezed in the county, the county court has no jurisdiction to proceed further in the case.
3. A judgment in attachment will be enjoined in equity if the defendant had no actual notice, and had a good defense, and his failure to make defense was owing not to any fault or negligence on his part, but to the fault of the plaintiff.

This was a cause in equity which was submitted for final decree on the pleadings and evidence.

*Mr. Arthur Hood*, for complainants.

*Mr. Herbert Fielder*, for defendants.

WOODS, Circuit Judge. This cause was commenced in the

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Zarega & Scott vs. McDonald.

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superior court of Randolph county, and was removed thence to this court by complainants, who are citizens of the state of New York.

The object of the bill is to set aside a judgment of the county court of Richmond county, rendered in a proceeding in attachment at the August term, 1867, in favor of McDonald, the defendant in this cause, and against the firm of Scott, Zerega & Co., of which complainants are surviving partners, for \$1,600.

The alleged facts, upon which said judgment was predicated, are these: McDonald had consigned thirty-three bales of cotton to complainants, in the city of New York, to be sold by them, not before the lapse of a specific time. The complainants sold the cotton without authority before the time fixed by McDonald for the sale, whereby he claimed to have suffered a loss of \$1,600.

McDonald swore out an attachment against Scott, Zerega & Co., in the county court of Randolph county, Georgia, on the ground that they were nonresidents of the state, and garnishee process was served on several citizens of Randolph county, and upon Nutting, Powell & Co., of Bibb county, Georgia.

All the persons served in Randolph county answered under oath, that they had no effects of, and were not indebted to the defendants in attachment. Nutting, Powell & Co., of Bibb county, made no answer. No property was anywhere seized by virtue of the attachment. Notwithstanding these facts, the plaintiff in attachment proceeded with his cause, submitted the same to a jury which rendered a verdict in his favor for \$1,600, and Nutting, Powell & Co., having failed to answer, judgment was rendered against them in Bibb county for the amount of the demand of McDonald.

The complainants aver, that they had no notice or knowledge of these proceedings in attachment; that they were not in any manner indebted to McDonald; that he had no claim upon them for damages; that they had a good defense to the said action, and that the county court of Richmond county had no jurisdiction to render said judgment.

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Zerega & Scott vs. McDonald.

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We think this judgment should be set aside, on several grounds:

1. The code of Georgia authorizes proceedings in attachment in cases of debt, and requires that the party seeking this remedy make oath of the amount of the debt claimed to be due. It was held by the supreme court of this state in *Mills v. Findlay*, 14 Ga., 280, that "under the laws of this state no attachment lies for the recovery of unliquidated damages consequent upon the breach of a covenant." The attachment in that case appeared to have been taken out for breach of covenant, in this, that the defendant had sold to the plaintiff the patent right for Bibb county to "Woodworth's Planing Machine," whereas, the plaintiff was not the owner of said patent, and had no right to sell the same.

It is true that this decision was made in 1853, before the present code of Georgia was in force, but the law then in force required the plaintiff in attachment to make affidavit of the amount of "the debt or demand which he believed to be due" (Cobb's Digest, vol. 1, p. 77), and this was held not to embrace unliquidated damages. This decision is contrary to the current authority in other states (*Lennox v. Howland*, 3 Caines, 323; *Wilson v. Wilson*, 8 Gill, 192; *Peter v. Butler*, 1 Leigh, 285; *Weaver v. Puryear*, 11 Ala., 941); but it is the construction put upon the local law by the supreme court of this state, and must be considered as a part of the statute. *Massingill v. Downs*, 7 Howard, 767; *Nesmith v. Sheldon*, 7 id., 812; *Webster v. Cooper*, 14 id., 504.

2. When, from the returns of the garnishees in Richmond county, it appeared that there were no debts due said Scott, Zerega & Co., in that county, and there being no property of complainants seized in that county, the county court had no jurisdiction to proceed further in the case.

3. I am satisfied from the evidence in this case that the complainants have a good defense against the claim of McDonald. As the judgment was taken against them without notice, it ought to be set aside.

A judgment in attachment will be enjoined, if the defendant

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**The United States vs. Collins.**

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had no actual notice and had a good defense to the suit, and his failure to make defense was owing not to any fault or negligence on his part, but to the fault of plaintiff. *Bank v. Ruse, Patten & Co.*, 27 Ga., 391.

A decree will be entered setting aside the verdict and judgment rendered in the county court of Randolph county against Scott, Zerega & Co., as in the opinion of this court, the county court of Randolph had no jurisdiction of the case.

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**THE UNITED STATES VS. COLLINS.**

(Before BRADLEY and WOODS, JJ.)

1. The act of congress of July 20, 1840 (5 Stat., 894), prescribing how jurors in courts of the United States shall be designated, does not require a minute adherence to the state practice on that subject by the United States courts.
2. It is not necessary, under said act, for the United States courts to employ state officers to perform for them any part of the duty of designating jurors. They may and should impose that duty entirely on their own officers.
3. The law of Georgia required that the names of jurors should be taken from the book of the receiver of tax returns; *held*, that this requirement was not binding on the courts of the United States. Those courts were only required to take care that their jurors had the same qualifications as jurors in the state courts.
4. A rule of the United States court for the southern district of Georgia, which prescribed that the names of five hundred persons, having the qualifications of jurors under the state law, should be selected from the body of the district by the marshal and clerk and three United States commissioners, to be designated by the court, and that the names of grand and petit jurors should be drawn from such list by the marshal and clerk, by lot, is in substantial accord with the law of Georgia prescribing how jurors shall be selected, and is a compliance with the act of congress on the subject.
5. Where a charge of misconduct is made against an officer, whether amounting to an indictable offense, or only to his discredit as such officer, which might furnish grounds for his removal or impeachment, he is not bound to be a witness against himself.

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6. An inquisitorial examination, under oath, of a party charged with an offense or misconduct, would infringe the spirit if not the letter of the fifth amendment to the constitution of the United States, and would be repugnant to the principles of personal liberty embodied in the common law.
7. One of the officers appointed to select the names of five hundred persons from whom jurors were to be drawn, applied to a reputable citizen of a distant county for the names of proper persons residing in his vicinity to be placed upon the list. The names furnished, in compliance with this request, were submitted to the board of officers whose duty it was to make out the list of five hundred names, and some of the names so furnished were put upon the list: *Held*, that this was a substantial compliance with the rule which required the selection of the names to be made by the board of officers.
8. A public officer cannot, by subsequent declarations, invalidate his own official act.

A motion was made in this case to quash the indictment, on the ground that the order of the court under which the grand and petit juries were selected and drawn, was illegal, not being in conformity with the requirements of the act of congress on that subject.

The act of congress governing the subject is that of July 20, 1840 (5 Stat., 394), and provides as follows, namely: "That jurors to serve in courts of the United States, in each state respectively, shall have the like qualifications, and be entitled to the like exemptions, as jurors of the highest court of law of such state now have and are entitled to, and shall hereafter from time to time have and be entitled to, and shall be designated by ballot, lot or otherwise, according to the mode of forming such juries now practiced and hereafter to be practiced therein, in so far as such mode may be practicable by the courts of the United States, or the officers thereof; and for this purpose the said courts shall have power to make all necessary rules and regulations for conforming the designation and impaneling of juries in substance to the laws and usages now in force in such state; and further, shall have power, by rule or order, from time to time, to conform the same to any change in these respects which may hereafter be adopted by the legislatures of the respective states for the state courts."

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On the 7th of December, 1872, the circuit court of the United States for the southern district of Georgia (Judges WOODS and ERSKINE holding the court), revised its rules respecting the mode of selecting and impaneling grand and petit jurors; and, in pursuance of these rules, on the 10th of January, 1873, the officers appointed by the court to that duty made out and returned the jury list, from which the grand jury was drawn that found the indictment in this case. The defendant moved to quash, on the ground that the mode of designating and impaneling jurors prescribed by the revised rules does not correspond to that used in the state courts, and that the qualifications of jurors are not the same as the state laws prescribe. For the defendant, it was contended that the act of congress required strict conformity to the state laws in these respects.

*Messrs. R. F. Lyon and Julian Hartridge*, for the motion.

*Messrs. H. P. Farrow*, U. S. Att'y, and *A. T. Akerman*, *contra*.

BRADLEY, Circuit Justice. A motion is made to quash the indictment in this case on the ground that the grand jury, by which it was found, was illegally selected and impaneled.

The process and procedure of the courts of the United States are, of course, subject to the sole regulation of congress and of those courts. They are entirely independent of state laws and usages, except so far as these may be adopted, or followed as a matter of convenience. There is no fundamental principle which requires a conformity thereto. Undoubtedly the convenience of the legal profession, and the habits of the people will be best consulted by a general conformity as far as circumstances will admit. That is all.

On the subject of selecting and impaneling jurors in the United States courts, congress at its first session, in the twenty-ninth section of the judiciary act, directed that they should be designated by lot, or otherwise, in each state, according to the mode therein practiced at that time, so far as practicable; and that they should have the same qualifications as required for jurors in the highest courts of the state; and should be returned from such parts of the district as the court should di-

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rect. This rule was subsequently modified and, in 1840, it was so framed as to adapt it to the changes which might, from time to time, be made by state legislation. By the act of July 20th, of that year, which is the law now in force (5 Stat., 394), it was provided "that jurors to serve in the courts of the United States in each state respectively, shall have the like qualifications, and be entitled to the like exemptions as jurors of the highest court of law of such state now have and are entitled to, and shall hereafter from time to time have and be entitled, and shall be designated by ballot, lot, or otherwise, according to the mode of forming such juries, now practiced and hereafter to be practiced therein, in so far as such mode may be practicable by the courts of the United States, or the officers thereof; and for this purpose the courts shall have power to make all necessary rules and regulations for conforming the designation and impaneling of juries, in substance, to the laws and usages now in force in such state," with power to make such changes in these respects as the legislature of the state may adopt.

It is pertinent to observe that congress does not adopt the respective state laws, but only requires conformity to them in certain respects, and then gives the courts power to make rules for the attainment of such conformity, in substance as far as practicable, in their different circumstances. The question now to decide is, whether the rules which have been adopted by this court on the subject, conform to the requirements of the act of congress. There is nothing in the act that requires a slavish or minute adherence to the details of the state practice; and nothing which hints at the incongruous notion that the courts of the United States in the designation and impaneling of jurors are to employ any officers or agencies except their own, and those under their control. The great object is to obtain jurors of like qualifications, and to designate and impanel them in substantially the same way as in the state courts. And, of course, this is to be effected by the courts of the United States themselves and their officers, and not by the agency of state courts or their officers; for the act, in speaking of the mode to

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be followed, expressly says, "in so far as such mode may be practicable by the courts of the United States, or the officers thereof." It would be an inconvenient mixture of jurisdictions, and might seriously embarrass the proceedings of the courts, if they had to depend on the action of state officials, over whom they have no supervision or control. This disposes *in limine* of the objection that the jury list was not taken, and that the rule does not require them to be taken from the lists made by the state authorities. As state officials make up the jury lists for the state courts, even strict parallelism of practice requires that the United States officials should make them up for the United States courts. The harmony of the state and federal jurisdictions requires that each should act freely and independently of each other.

The question then recurs, whether the rules adopted by this court in reference to juries accords with the act of congress, in adopting the state practice, so far as the courts of the United States and the officers thereof, independent of the aid of the state courts and officers, can practicably conform to such practice in the respects required by the act. Conformity is required by the act in two respects: *first*, in reference to the qualifications and exemptions of jurors; *secondly*, in reference to the mode of designating and impaneling jurors, as by ballot, lot or otherwise, which mode is to be conformed, in substance, to that pursued in the highest court of the state.

It will be observed that the act does not require the court to make any rules with regard to the qualification of jurors, but only with regard to the mode of selecting them.

Qualifications have respect to the juror personally, and may relate to his age, his property, citizenship, or anything else belonging to his personal character or standing. In the state of Georgia the only qualifications of jurors, expressly required by the constitution and laws, are that they shall be upright and intelligent jurors between the ages of 21 and 60. There is an implied qualification that they shall be tax payers, and therefore citizens, as the statute of February 15, 1869, requires that they shall be selected for the state courts in each county from

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the book of the receiver of tax returns. Of course, the placing of a man's name on the receiver's book is not a qualification; for it is the act of another man. It implies a qualification, however, namely, that of being a tax payer, or a person liable to pay taxes and to have his name placed on said book.

Now all these qualifications are required in jurors by the rule of this court. The officers appointed for the purpose are to select from the body of the district five hundred upright and intelligent persons, citizens of the district (and of course tax payers), between the ages of 21 and 60 years, without regard to race, color, or previous condition, to serve as jurors.

As before remarked, it was not necessary that the rule should have specified these qualifications. Jurors not having them could be objected to by a challenge to the polls without any rule of court on the subject. But the rule has specified them, and in doing so has adopted the qualifications which the state laws require. On this point the objection to the rules cannot be sustained.

The next question is, whether the rules of this court have in substance adopted the mode of designating and impaneling jurors, which is prescribed by the state laws, as by ballot, lot, or otherwise. The act of congress requires that they shall "be designated by ballot, lot, or otherwise, according to the mode of forming such juries," practiced in the highest court of law of the state, "in so far as such mode may be practicable by the courts of the United States, or the officers thereof, and for this purpose" (that is, for the purpose of securing the designation of jurors by ballot, lot, or otherwise, according to the mode practiced in the state courts), the courts of the United States "shall have power to make all necessary rules and regulations for conforming the designation and impaneling of juries, in substance, to the laws and usages" of the state. From this language of the act it is obvious that all that is required is, that the mode of designating and impaneling be substantially the same; not that the officers to carry it into effect shall be the same either in rank or in number; nor that the same kind of jury boxes, or material of which the boxes are composed,

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whether wood or iron, shall be the same; nor that they shall be kept and guarded in the same manner; nor that the same number of names shall be placed in the box; nor that in any other matter of detail, a minute imitation of the state practice is to be observed. In these matters the courts of the United States may exercise their discretion as to the best mode of securing the main object of the law, which is, to secure the service of properly qualified juries, selected and impaneled substantially according to the mode pursued in the state courts.

Now, what is the mode pursued in these courts? The constitution of the state (art. V, sec. XIII, par. II) simply declares that "the general assembly shall provide by law for the selection of upright and intelligent persons to serve as jurors," and that "there shall be no distinction between the classes of persons who compose grand and petit jurors." Not every person, not every citizen, is to be placed on the jury list. A selection is to be made; and the object of that selection is to procure those who are upright and intelligent. Who is to make this selection is left to the legislature to prescribe. Now, can it be possible that state or county officials may be vested with this power of selection, and that United States officials must be denied this power? Can it be the meaning of the act of congress that the courts of the United States must only take jurors whom the state officials may have selected? The considerations before referred to respecting the necessary independence of these courts upon the action of state officers and state courts, seem to afford a complete answer to these questions.

On looking at the act of assembly before referred to, passed to carry the constitutional clause into effect, we find that it provides substantially as follows: That the ordinary of each county, together with the clerk of the superior court and three commissioners appointed by the presiding judge of the superior court (and removable at pleasure) shall meet at the court house on the first Monday in June, biennially, and select from the book of the receiver of tax returns, upright and intelligent persons to serve as jurors, and make out tickets with the names

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of the persons so selected, and put them in a box having two apartments, to be locked and sealed by the judge and placed in the care of the clerk, and the key in the care of the sheriff; and no grand or petit juror shall be drawn but in the presence of the judge in open court, and no person shall open the box, or alter the names placed therein. It further provides that at the close of each term, the judges of the superior court, in open court, shall unlock the box and break the seal, and cause to be drawn from apartment No. 1 not less than 18, nor more than 23 names, to serve as grand jurors at the next term; and then 86 names to serve as petit jurors — which names are to be deposited in apartment No. 2 until all are drawn from No 1, and so on alternately. Directions are then given for issuing a precept to the sheriff to summon the jurors so drawn. Provision is also made for summoning talesmen in case of necessity.

Now with these regulations let us compare the rules adopted by this court. They are as follows:

**“ORDER OF COURT AMENDING JURY RULES.—**The court shall appoint three of the United States commissioners residing in the southern district of Georgia, and the said commissioners with the marshal for the district of Georgia, and the clerk of the court shall, within thirty days after the adjournment of this court, select from the body of the southern district of Georgia, five hundred upright and intelligent persons, citizens of said district, between the ages of 21 and 60 years, without regard to race, color, or previous condition, to serve as jurors. And the clerk of the district and circuit courts for said district, and marshal, shall place the names of the persons so selected in a box, from which they shall draw within ten days after said names are so deposited, not less than forty-five nor more than fifty names, unless otherwise ordered by a judge, to serve as jurors in the circuit court, and not less than forty-five nor more than fifty names, unless otherwise ordered by the judge, to serve as jurors in the district court. And the first twenty-three names so drawn for each court shall be the grand jurors for such court, unless the court or a judge shall otherwise order.

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“ And within thirty days after each succeeding term of said courts respectively, unless previously drawn by the court, it shall be the duty of the marshal and clerk to draw from said box in the manner before stated, the same number of jurors to serve at the next succeeding term of said courts respectively, unless the number is changed by order of the judge. And if from any cause they are unable to procure from the body of the district, as before required, the names of the requisite number of qualified jurors, then in that event, the names of those they have been able to obtain shall constitute the list from which said jurors shall be taken, and the names of those so drawn shall be placed in another compartment of said box, there to remain until all the names shall have been drawn from the first compartment. The said box shall be kept locked, except when opened for the purpose of drawing or revising the list, and the clerk shall keep the box and the marshal the key. If from failure to draw, as hereinbefore directed, or from any other cause, there shall be a deficiency in whole or in part of regular jurors, the court may order that upright and intelligent persons from the body of the district shall be forthwith summoned as jurors or talesmen as the case may be.

“ If the court should not sit at any term, the jurors drawn for that term shall stand over for the next term that shall be held.

“ The marshal shall summon jurors by delivering to each personally, or by leaving it at his usual residence, a written or printed summons.

“ The marshal, the clerk, and any one of said commissioners shall constitute a quorum for the purpose of carrying into effect this rule. And a deputy marshal may, in any case, whether in selecting or drawing jurors, or otherwise in the premises embraced in this rule, do whatever the marshal may himself do..”

It seems to me very difficult to perceive any substantial difference between the mode of designating and impaneling jurors prescribed by these rules, and that prescribed by the state statute, after making due allowance for the different circum-

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stances of the two jurisdictions and the practicabilities of the case.

In the first place a selection is to be made by officers designated for that purpose, in order to obtain upright and intelligent men. This selection is to be made from the body of citizens of the district, without regard to race, color, or previous condition. This is certainly in substantial conformity to the state law. It needs no argument to make it plainer than it is, by the mere statement of the fact. The qualification that the selection shall be made without regard to race, color, or previous condition, is in accord with the spirit of the fourteenth and fifteenth amendment to the constitution; by which all persons born or naturalized in the United States are citizens and entitled to full equality before the laws.

But it is objected that the marshal is substituted for the ordinary in the constitution of the board of commissioners, and that the ordinary is a judicial officer, whilst the marshal is not. There can be nothing in this objection. The conformity required is in substance only, and only as far as practicable for the courts of the United States and the officers thereof. The United States have no such officer as the ordinary. No officer could be more appropriately appointed than the marshal. But the comparison need not be minutely made between the officers. A board of responsible and suitable officers is constituted for the purpose of making the selection of jurors from the body of citizens. This is in substantial conformity to the state law.

The disposition of the names when selected is the same. They are placed in a box on separate pieces of paper, and from that box the panels of grand and petit jurors are drawn from time to time as occasion requires, substantially in the same manner as in the state courts, due regard being had to the convenience of the court and the circumstances of the case. The objection that the drawing is to be made by the marshal and the clerk, within thirty days after each term, and not as in the state court, on the last day of term in open court, goes to a matter of practice and detail, and not to the substantial mode of designating, or empaneling the juries, in the respects de-

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manded by the act of congress. The mode adopted is the same. It is the drawing of the names by lot. The designation of the officers by whom it shall be done is left to the discretion and judgment of the court.

It seems to me, after a careful consideration of the objections which have been so ably urged, that the regulations adopted by this court are in substantial compliance with the act of congress. As it may be doubtful whether the question raised by this motion can be carried to the supreme court, and as the matter is one of great interest to this and other states, I shall avail myself on the first opportunity, of consulting the views of my associates on the supreme bench, and if any different result should be arrived at, this court will cheerfully modify its rules. As they now stand, whilst they seem to us entirely unobjectionable in point of law, they are in the most practicable and convenient form for the due administration of justice and the performance of the business of the courts.

The motion to quash the indictment for the cause now alleged is overruled.

WOODS, Circuit Judge, concurred.

In another case which came up after the foregoing decision was made — being the case of *Rich v. Campbell* — the panel of petit jurors was challenged on the ground taken in the previous case, and on the further ground that the officers appointed to designate and impanel the jurors for the United States courts had not complied with the rule, but had selected jurors from improper motives and for a special purpose. Evidence was taken on the challenge.

*Mr. R. F. Lyon*, for the challenge.

*Messrs. H. P. Farrow*, U. S. Attorney, *A. T. Akerman* and *A. W. Stone*, *contra*.

BRADLEY, Circuit Justice. The array of jurors in this case is challenged by the defendant for several causes. One class of causes assigned consists of objections to the legality of the mode, adopted by this court by its general rule of the 7th of

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December last, of designating and impaneling jurors. This question has already been examined in the case of *The United States v. Collins*, and the objection was decided to be without foundation.

The other causes of challenge assigned are, that the jurors were not designated, selected and drawn in accordance with the rule, but that contrary thereto, they were designated with reference to their race, color and condition; and that they were selected, not by the persons appointed by the court for that purpose, but upon private information from irresponsible persons; and not from the body of citizens of the district, but from certain classes thereof, under private instructions from some of the persons appointed to make the selection as to the status, color and political bias of the persons whose names were to be furnished to make up the panel.

The challenge being traversed, evidence was adduced for the purpose of sustaining the charges made in the challenge. Amongst other witnesses the defendant called to the stand the marshal of the United States for this district, who is one of the officers appointed by the court to select and make up the list of jurors for the district, according to the rule made on the 7th of December last, and whose official conduct in that matter is impeached by the challenge. We refused to compel him to testify, for the following reasons:

Where a charge of misconduct is made against an officer, whether amounting to an indictable offense, or only to his discredit as such officer, which might furnish grounds for his removal or impeachment, he is not bound to be a witness against himself. To compel him to be so would infringe the spirit, if not the letter, of the fifth amendment to the constitution of the United States, which expressly declares that no person shall be compelled, in any criminal case, to be a witness against himself. An inquisitorial examination, under oath, of a party charged with an offense, is repugnant to the principles of personal liberty, which are embodied in every fibre of the common law. The French system of procedure, which allows the defendant to be examined as to his whole previous history, and

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as to the private motives by which he was governed in all the transactions of his life, is abhorrent to our feelings of justice and fair play. I should regret ever to see that system obtain a footing in this free country. If the party chooses to waive his right and submit to an examination, it may be admissible where public interests will not thereby be affected. But even then, the practice may, in certain cases, be against the public interest and contrary to public policy. If the party stand upon his rights, it raises an implication, however unjustifiable, that there is some good reason (unfavorable to him) for his refusal to be examined. Such an implication ought in no case to exist. The immunity is founded on principles of public policy and a regard to the just liberties of every citizen; and, when claimed, ought to be regarded and claimed as a fundamental right which cannot be properly assailed.

Applying these principles to this case, it is apparent that the conduct of the officers concerned in the designation and impaneling of jurors is seriously impeached by the challenge, and that to subject them to an examination under oath upon the matters charged would be, in effect, to compel them to testify on a criminal charge against themselves, and would, therefore, be a subversion, not only of their rights, but an invasion of the rights of all good citizens.

The other evidence offered by the defendant was in substance as follows: He proved by Elijah Bond, the postmaster at Macon, that at the request of the marshal he made out a list of names for jurors from the county of Bibb, which was partially adopted by the officers as a part of their list for the district; that he conferred with one or two other gentlemen on the subject, one of whom was the ordinary of the county; that he tried to get good men, and thought he did; that he received no instructions from the marshal as to the manner in which he should select, except a request to furnish the names of good and substantial citizens; that he endeavored to do so without regard to color; that he avoided those who had been engaged in the late election riots, it is true, and tried to select men who were not extreme men either way, but fair men; that

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he had lived in Macon since 1839, and was an officer in the Presbyterian church in that place; that Mr. Swayze, one of the commissioners appointed by the court to select jurors, and who resided in Macon, was absent at the time out of the state, and he had no conference with him on the subject. This was the substance of his testimony as far as it was material.

From this testimony the defendant's counsel argued, that the officers appointed by the court to select jurors did not make the selection themselves, but left it to others; and that this rendered the list illegal. But it was very pertinently answered by the counsel for the officers, that the giving of information was very different from official action. Four of the officers—the marshal, the clerk of the court, and two commissioners, Messrs. Wilson and Wade—on the 9th and 10th of January last, met in Savannah (the clerk, marshal and commissioner Wilson having held a preliminary meeting about a month previous) and proceeded to execute the powers conferred upon them by the court, and formed a list of five hundred names of persons selected from the body of citizens of the district, and certified and returned the same to the court, as directed by the rule. This they did officially, on their official responsibility; and in their return they certify that the names designated and returned by them, were the names of upright and intelligent persons, citizens of the district, between the ages of twenty-one and sixty, selected from the body of the district without regard to race, color or previous condition. This official certificate of these officers must be regarded by the court as conclusive evidence that they have properly performed their duty, unless the contrary be clearly proven. The only effect of Mr. Bond's evidence is, to show that they took proper means to get the requisite information as to the proper persons to select, by applying to the most competent and reliable persons for such information. It was conceded that a more upright and reliable man than Mr. Bond, the witness, could scarcely be found. What other means the officers may have employed to corroborate the information received from Mr. Bond does not appear. It could not be expected that the officers should be personally ac-

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quainted with the entire male population of the district, consisting of more than eighty counties. They were necessarily obliged, in many cases to rely on information derived from others. If they acted in good faith in getting the best information they could, and made their selection accordingly (and nothing appears to the contrary, but that they did this), their action cannot be impeached or held invalid. Impossibilities cannot be required of any officers.

We see nothing in the evidence of Mr. Bond to impeach the jury list ; but the contrary.

Some further evidence of a very unimportant character was adduced, which it is unnecessary to notice.

The defendant's counsel, however, produced and read an article published by Mr. Swayze, one of the commissioners appointed to select jurors, in a newspaper called the Macon Daily Enterprise, on the 7th inst., vindicating himself and the commission from attacks made against them in other newspapers. From this article the defendant's counsel asks us to gather by inference the conclusion that the jury commissioners had a purpose in making their selection of jurors, of selecting such persons as would carry out a certain result, namely: the indictment and conviction of certain persons charged with being concerned in the Macon riot last October ; or more generally, the furtherance of government prosecutions in the district.

Now we have examined this article, and can see no such fact implied in it. So far as it bears on the point under consideration, the whole pith of it is, that the jurors as before selected, being taken from the lists prepared by the county officials, ignored the enforcement act altogether, and refused to find a bill — no matter what the evidence — against a single person out of some forty, who had been bound over on the charge of participating in the election riot before mentioned, in which some persons were killed ; and that the court made the new rule for the purpose of obtaining jurors, who would regard their oaths and recognize the law of the land ; and that the jurors selected are men of that character. If this were proper evidence in the case at all, it would only go to show that jurors were

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sought who would act fairly and honestly, and in obedience to the laws ; not that those were sought who would do any man's bidding, or who would aim at any result other than the truth and the right. This is a very different thing from packing a jurybox for the purpose of attaining a particular result in a particular case.

But it is not evidence in the case at all. The declarations of Swayze, made after the list was selected and returned, are nothing but hearsay. They cannot affect the list in the least. The truth of this proposition is so obvious that it is unnecessary to discuss it. A person cannot by mere declarations made subsequently, invalidate his own deed or official act. Untold mischief would ensue if such a doctrine were established.

Besides, it appears from the return that Mr. Swayze did not act with the other commissioners in making the selection, although he subsequently appended a certificate that he had examined the list and approved of it. He appears to have been absent from the state when the selection was made. This circumstance is an additional reason, if any were needed, for disregarding his published article as evidence for any purpose in the case.

It seems to us that the challenge has not a shred of evidence to support it ; and so far as appears from the characters of the persons composing the grand and petit juries of the present term, the selection has been eminently judicious and proper.

The challenge is not sustained.

WOODS, Circuit Judge, concurred.

At the March term, 1873, of the United States circuit court for the northern district of Georgia, several of the same questions decided in the foregoing cases were argued before ERSKINE, district judge, in the case of the *United States v. Gardner*, upon a challenge to the array of petit jurors.

Messrs. B. H. Hill, L. J. Gartrell and C. Peebles made arguments in support of the challenge.

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*Messrs. H. P. Farrow, United States Attorney, George S. Thomas, Assistant United States Attorney, A. T. Akerman and A. W. Stone, contra.*

As the decision of Judge ERSKINE presents an able review of the subject, it is here subjoined.

ERSKINE, District Judge. Before the perusal of the panel, comprising six white persons and six colored, defendant challenged the array on the ground that the jury was illegally constituted, and moved that the array be quashed:

"First. Because the United States jurors are required to be selected by the United States statutes, according to the laws of each state where said United States courts are held.

"Second. Because there is no authority of law for the United States court to appoint commissioners to select jurors.

"Third. Because the rules of court under which said jury was selected and impaneled limits the number of jurors to five hundred.

"Fourth. Because the manner of selecting jurors heretofore practiced by the United States courts in this state has not been repealed by competent authority.

"Fifth. Because the rule of court, under which the said panel of jurors was drawn, selected, summoned and impaneled, is without sanction of law, and contrary to the statutes of the United States in such case made and provided.

"Sixth. Because said panel of jurors was not drawn, selected and summoned according to law."

Other objections — corollaries from the foregoing — were advanced during the arguments.

These authorities were cited and relied upon by counsel for challenger: Code, sections 3842, 3858 and 3859; Article 5, section 13, State Constitution; Act of February 15, 1869; Judiciary Act, sec. 29 (1 Stat., 88); Act of July 20, 1840 (5 Stat., 394); *United States v. Woodruff*, 4 McLean, 105; *Same v. Wilson*, 6 id., 604; *Clinton v. Englebrecht*, 13 Wall., 434; Act of June 1, 1872 (17 Stat., 196).

The second paragraph of the 13th section of the 5th article

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of the state constitution of 1868 says: "The general assembly shall provide by law for the selection of upright and intelligent persons to serve as jurors. There shall be no distinction between the classes of persons who compose grand and petit juries." The third sentence refers to the compensation of jurors.

On the 15th of February, 1869, the general assembly passed an act to carry this clause into effect. This act contains eighteen sections — I will give the substance of so much of it as is applicable to the subject now before the court. It makes it the duty of the ordinary of each county, together with the clerk of the superior court, and three commissioners appointed for county by the judge of the superior court, to meet at the court house on the first Monday in June, biennially, to select from the book of the receiver of tax returns "upright and intelligent persons" to serve as jurors, and to make out tickets, with the names of persons so selected, and place them in a box, which shall be locked and sealed by the judge. And no grand or petit jury shall be drawn but in the presence of the judge in open court. But (by section 3) if the judge should fail to draw juries, then the ordinary, together with commissioners and clerk of said county, shall meet at the court house, within a certain time, and there draw grand and petit juries, all of which shall be entered by the clerk on the minutes of the court and signed by the ordinary.

On reading the act just referred to, and which is entitled "An act to carry into effect the second clause of the 13th section of the 5th article of the constitution," it will disclose the fact that although it provides that the persons selected to serve as jurors shall be "upright and intelligent" (using the words of the constitution); yet it does not speak of the second sentence which declares: "there shall be no distinction between classes of persons who compose the grand and petit juries." Was this a *casus omissus*? Looking to the title of the act, there would appear to be some possible ground for this. But does not this very sentence carry itself into effect without legislative aid? Is it not *per se* operative and to be obeyed; and

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was not this probably the opinion of the legislature? My mind has always been impressed, with reasons too cogent to be discarded, that, notwithstanding the omission, it was the purpose of the legislature, by this enactment, to carry the entire clause into effect, and not to give force to a part only.

During the first term of this court, after its organization, in framing the jury rule (to be considered presently), the substance of the second sentence was incorporated into it. If this sentence is dormant, and requires legislation to bring it into action, then I may inquire, Was the embodying of the substance of the sentence in the rules of court, going beyond the pale of the act of February 15, 1869 — giving to it a too elastic construction?

By a rule of the United States district court (having circuit court jurisdiction) for this district, adopted at the March term, 1871, the marshal was instructed to procure from the superior court clerk for each county, comprising this district, a certain number of names of the "most upright and intelligent persons," between the ages of twenty-one and sixty years, to be taken from the jury lists of the county, without regard to race or color. Comment was made by counsel on both sides, during argument, on the insertion of the word "most" before and in connection with, "upright and intelligent," in the rule of the district court. Whether the word "most" was in the draft of the rule which I wrote, I do not now remember; if so, it was unadvisedly there. But what impediment would it have been to justice? Can either side complain? Was not the word, by fair intendment, to be applied to each class, white and colored? At most the word but expressed moral fitness as necessary to the end proposed. But to return; nearly seventeen hundred names were forwarded to the marshal (before the abrogation of this rule) by these clerks who responded to his request, and for which the government paid them. While this rule was of force, more than two hundred and fifty names were drawn from the jury box by the court, or its officers; but strange as it may appear, every ballot drawn from the box contained the name of a white person. Now, as the ratio of the classes in

this judicial district has been for years past, as eight white to five colored, or nearly so, it is obvious to the common mind that this mode of designating or selecting the jurors cast the entire burden of jury service in the federal court upon one of the classes only — white citizens; thus releasing colored citizens, who possessed the qualifications for jurors, from the performance of a duty which they, equally with the qualified white citizens, owed to their country. Not only the constitution of this state, but the recent amendments to the national constitution have made the colored man a citizen; habilitating him with all the rights, privileges and immunities enjoyed by the white citizen; therefore, he should perform his part of the public labor.

On the first of June, 1872, congress passed an act taking away the circuit court powers from the district court for this district, and establishing a separate circuit court. At the first term a rule of court was adopted, and it was under this rule that the persons now in the traverse jury box were designated, summoned and impaneled. But, before passing to this rule, it may not be wholly amiss to mention that it is a copy — *mutatis mutandis* — of the rule which met the sanction of, and was adopted by the United States circuit court for the southern district of this state, at the last November term. The court was composed of WOODS, Circuit Judge, and ERSKINE, District Judge. (See *ante*, p. 506.)

Attention will be directed to the act of July 20, 1840 (5 Stat., 394); [1] "Jurors," says the act, "to serve in the courts of the United States, in each state respectively, shall have the like qualifications, and be entitled to the like exemptions, as jurors of the highest court of law of such state now have and are entitled to, and shall hereafter, from time to time, have and be entitled to, [2] and shall be designated by ballot, lot or otherwise, according to the mode of forming juries now practiced and hereafter to be practiced therein, in so far as such mode may be practicable by the courts of the United States or the officers thereof; [3] and for this purpose the said courts shall have power to make all necessary rules and regulations

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for conforming the designation and impaneling of juries in substance, to the laws and usages now in force in such state; [4] and further, shall have power, by rule or order, from time to time, to conform the same to any change in these respects which may be hereafter adopted by the legislatures of the respective states for the state courts."

For convenience in the endeavor to interpret and construe this act, the clauses have been marked 1, 2, 3, 4. 1st. The qualifications of jurors, as mental capability, residence, age, etc. The second section of the first article of the constitution says: "All persons born in the United States and residents of this state are hereby declared to be citizens of this state." The requisite qualifications for persons to serve as jurors in the highest courts of law of this state, as declared by its constitution and laws, are that they be "upright and intelligent persons;" that they have resided in the county for six months immediately before they are called upon to serve as grand and petit jurors; that they are above the age of twenty-one years and under the age of sixty years." Code, sections 3841, 3858. No property qualification is required in this state for a juror, and if it is not a mere rule of convenience for ordinaries, clerks and commissioners to select jurors from the book of the receiver of tax returns, and it be a necessary qualification that the juror must be a tax payer, then that qualification is included in the qualification of age. (Acts of March 18, 1869, and of January 19, 1872.) To be "white" was another qualification for a juror, but this no longer exists. The language employed by congress in this clause of the act of 1840 is direct and positive; it is also mandatory to the federal courts — that jurors, to serve therein, shall have like qualifications and be entitled to like exemptions as those of the highest courts of law in the state where the national court is held. Under this clause no discretion is given to the court.

Clauses 2, 3 and 4 may be considered together. They provide for the designating or selecting of jurors by ballot, lot or otherwise, according to the mode of forming juries as practiced in the state wherein the federal court is being held, so far as

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such mode may be practicable by said court, or its officers, giving the power to said courts to make all necessary rules and regulations for conforming and adapting the designation and impaneling of jurors, in substance, to the laws and usages in force in the state at the time. Now, it was contended by counsel for the challenger that, for the designating or selecting of qualified persons to serve as jurors in this court, state authority — for example, a board comprising the ordinary of the county, the superior court clerk, and also three commissioners appointed by the judge of the superior court, is the proper agency to act in the premises; that it, and not the national court or its officers, is the agent to designate each particular juror to serve in this court, from the list on the books of the receiver of tax returns. The employment of state agency to designate or select jurors for the United States courts was not, in my opinion, contemplated by congress in making this law. The language of the act is, that the jurors “shall be designated by ballot, lot or otherwise, according to the mode of forming juries now practiced and hereafter to be practiced therein, in so far as such mode may be practicable by the courts of the United States or the officers thereof.” Is it not the plain meaning of this, that the designation or selection is to be made by the national and not the state officers? But the argument of counsel, in its tenor, indicated that, at least, if the officers of this court are to designate or select its jurors, the names should be taken from the list of tax payers in each county in the district found on the tax receiver's books. If jurors, as the rule requires, are to be taken from the district at large, this would be virtually impracticable.

And even if it were practicable to thus select them, I do not think the statute requires it to be done. The legal object is to select persons who possess the qualifications; it is not the mode in which this is to be accomplished that is imperative upon the court. In this matter a large discretion has been bestowed upon it by the statute itself.

Objection to the rule was urged for the challenger, “because the rule of court under which the jury was selected and impan-

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eled limits the number of jurors in this district to five hundred." I have looked into this question, and I find nothing in any of the laws of congress as to what number shall be designated or selected. The acts of 1789 and 1840 apply only to the mode of selecting jurors and not to the number.

Counsel relied on the 5th section of the act of congress of June 1, 1872 (17 Stat., 196). This section declares (in substance) that the United States courts shall conform, as near as may be, to the practice, pleadings and modes and forms of proceeding in other than equity and admiralty causes as they may exist in like causes in the courts of record in the state at the time of holding the United States court therein. The act has no reference to the designating or selecting of jurors; nor, in my opinion, has it any application to the practice, pleadings or mode of proceeding in criminal cases as practiced in the state courts.

The case of *United States v. Wilson*, 6 McLean, 604, was read and earnestly discussed. Two questions were before the court for decision in that case. The first was the construction of the act of July 20, 1840. Speaking of the first clause of the act, WILSON, J., said: "So far as relates to the qualifications and exemptions of federal jurors, the courts have no discretion." And the learned judge also said: "The courts from necessity were to exercise a discretion as to the practicability of designating and impaneling jurors according to the mode prescribed for selecting juries of the highest court of law in the state. They have the power and the discretion to change the mode from time to time. The court may exercise the power, or refrain to exercise it, as it may now deem practicable." The other question for decision was, whether where a grand jury, consisting of fifteen members, fourteen of them — the fifteenth being absent — return a true bill into court, the indictment was well found. The court held it was. But it further held, that if a grand jury has even one disqualified person on the panel, the whole jury is tainted, and an indictment found by such a body would be void. And this has been the doctrine as to grand juries in England for the past four hundred years, and it prevails in this country. *Doyle v. The State*, 17 Ohio, 222.

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Counsel also relied on *Clinton v. Englebrecht*, 13 Wallace, 434. This case arose exclusively under a law of the territory of Utah. The court there, proceeding on the theory that it was a court of the United States, issued an open *venire* to the marshal, acting apparently on the hypothesis that it was to be governed in the selection of jurors, by the acts of congress. Chief Justice CHASE, in delivering the opinion of the court, held that the territorial court erred both in its theory and in its action; and that the making up of the lists and all matters connected with the designation of the juries were subject to the territorial laws.

Reliance was likewise placed by counsel for the challenger in the case of the *United States v. Woodruff*, 4 McLean, 105. The defendant objected to a trial, on the ground that the jurors had not been selected conformably to the act of congress of July 20, 1840. The court, Mr. Justice McLean, in delivering the judgment, said:

"By an early rule of this court the clerk is required to issue a *venire facias*, commanding the marshal to summon twenty-four persons to serve as traverse jurors. \* \* \* By the act of Illinois of the 3d of March, 1845, for the selection of jurors, it is made the duty of the county commissioners to select jurors. Now this court cannot call upon the officers of the state to do this duty, but we are bound to conform, as nearly as may be, to the state practice. The *venire* under the above rules leaves the selection of the juries to the marshal as his convenience shall permit. This does not, therefore, conform to the state practice. The jurisdiction of this court extends throughout the state, consequently the jurors should be selected from the state at large, and their names should be inserted in the *venire*. The court will therefore adopt a rule requiring the clerk and marshal to select the jurors from the state at large, previous to each term, and to conform in doing so, as near to the state practice as may be practicable."

The case of the *United States v. Wilson*, instead of showing that the rule is not in conformity to the laws of congress, is to my mind, an authority which sustains its legality. The case of

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the *United States v. Woodruff* is so directly applicable, so fully covers the whole question, and so clearly supports the rule that no other authority need be adverted to, or invoked.

The motion to quash the array is overruled.

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**NOVEMBER TERM, 1873.**

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**SAMPLES VS. THE BANK.**

1. Under the 89th equity rule, when a defendant sets up in his answer the bar of the statute of limitations, and the same is well pleaded, he is thereby excused from further answer to such parts of the bill as are covered by it.
2. When a bank has suspended payment and its bills have ceased to circulate as money, the statutes of limitation apply to them as to other contracts.
3. The sixth section of the act of the legislature of Georgia, approved March 16, 1869, entitled an "act in relation to the statute of limitations and for other purposes," applies to a suit founded on the notes of a suspended bank.
4. A statute which took effect March 16, 1869, and which declares that all actions upon contracts, etc., which accrued prior to June 1, 1865, shall be brought before January 1, 1870, or both the right and right of action shall be barred, does not impair the obligation of contracts and is not unconstitutional.
5. When a creditor's bill is filed in the state court, under the laws of Georgia, to settle a trust, all creditors notified of the bill according to law are parties and bound by the decree.

IN EQUITY. Submitted on exceptions to the sufficiency of the answer.

*Mr. James S. Hook*, for complainant.

*Mr. W. H. Hull*, for defendants.

WOODS, Circuit Judge. The bill is filed against the City Bank, a corporation under the laws of Georgia, domiciled in the city of Augusta, Joseph C. Fargo, Charles Baker and others, citizens of Georgia. It alleges, in substance, that complainant is the holder of certain bills and notes, to the amount of five thousand, four hundred and forty-six dollars, issued by

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the City Bank under a charter granted by the legislature of the state of Georgia, which the complainant acquired in the course of his business and for a valuable consideration. That the bank, soon after the issue of the notes, suspended specie payment, ceased to do business and failed to redeem or pay its notes. That after such failure the bank distributed among its stockholders a large amount of gold and silver coin to the amount of \$70,000, and also certain other large sums as dividends amounting to \$30,000. That as late as January, 1866, the bank had on hand a reserved fund of \$100,000, notes discounted to the amount of \$50,000, and bonds and stocks amounting to \$200,000, real estate amounting to \$30,000, bank notes and coin amounting to \$75,000, and other amounts worth \$20,000. Nevertheless it has refused to pay any portion of its notes so issued except at a large discount, to the fraud and injury of the billholders.

That on January 10, 1868, the bank executed a deed of conveyance for the benefit of its creditors, the schedule of which did not contain a full account of the assets of the bank, which constituted a fund for the payment of its debts. Neither the assets above named, nor the large amount of gold and silver coin divided as aforesaid among the stockholders, are mentioned in the deed, and the officers of the bank being stockholders have received a portion of the surplus fund and coin, and have failed to call in and appropriate any portion of the same to the redemption of the outstanding bills.

That defendant Fargo received at the time of the distribution of the coin and surplus fund aforesaid, the sum of \$1,834 in coin; defendant Charles Baker, \$832; defendant Alfred Baker, \$5,600, and other named defendants certain sums specified respectively.

That the complainant is unable to state what further sums said defendant stockholders or other stockholders received, and asks that said defendants be required to make discovery. The bill further alleges that the funds so improperly distributed would, taken with the assets in the hands of the assignee, be sufficient to pay all the debts of the bank.

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That after said deed of assignment, complainant demanded of Joseph C. Fargo, the assignee, that he recall from the stockholders all the funds and coin so improperly divided among them, in order to the payment of the debts of said bank; but said Fargo being a stockholder himself, and having received a part of said coin and other assets, and combining with other stockholders, refused and still refuses so to do.

That said Joseph C. Fargo and the other stockholders, defendants, combining with one Miles G. Dobbin and others, have obtained from the supreme court of Richmond county, a decree by consent, to distribute the funds of the bank and discharge said assignee, upon his complying with the terms of said decree. That under said decree a final distribution of assets was made to the stockholders at the rate of \$4.50 for each share of stock. Said decree was made on March 14, 1870, without notice to complainant, who was not a party to the suit, and was obtained in order to defraud complainant, and other billholders and creditors of the bank, who were not parties to said decree, and complainant had no notice of said decree until after final distribution was made.

That said distribution of gold and silver coin to the stockholders, while the outstanding bills were unredeemed, was a fraud upon the billholders of said bank, and that complainant knew nothing of said distribution until after January 1, 1870.

That said deed of assignment, while purporting to be a conveyance of all the assets of said bank, was not in fact so, and did not give a correct schedule of all the assets of the bank, and this fact was first discovered by complainant since the first day of January, 1870.

The bill prays for an account of the assets of the bank, owned by it on January 9, 1866, and for the application of the same to the payment of complainant's debt, for an account of the amount due complainant, and that each of defendants may be required to account for the coin and surplus funds received by him from the assets of said bank, and that they may be decreed to pay the complainant, on his said debt, what shall appear to be just and due and owing to him.

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To this bill the defendants, under the 89th equity rule, which provides that "the defendant shall be entitled in all cases, by answer, to insist upon all matters of defense in bar of or to the merits of the bill of which he may be entitled to avail himself by a plea in bar," have filed an answer in which they set up in bar of the complainant's claim, the statute of limitation passed by the legislature of Georgia, approved March 16, 1869, entitled "an act in relation to the statute of limitations, and for other purposes" (Laws of Georgia, 1869, 133), and also the general statute of limitations.

The complainant has excepted to the answer as evasive, imperfect and insufficient in refusing to answer a part of the interrogatories and in not fully answering others.

These exceptions present the question, whether the statute of limitations, pleaded by defendants, is a bar to the relief claimed; for if it is a bar, it excuses the defendants from further answer.

That part of the answer which sets up the limitation is in these words: "To all the charges in said bill, touching dividends of any kind declared by said City Bank, or the disposal of its assets by said bank, save the said assignment, defendants decline to answer, because they say that none of said dividends were declared, nor any payments or transfer of money or assets, made by said bank to its stockholders, at any time after the 31st day of May, 1865. And all the bills held by complainant were issued before said last named date, and none since that time, and that at said last named date, and continuously since that time, said bank has been notoriously insolvent, and had and ever since has ceased to transact business or to keep any banking office or place of business, and all said bills have since that time ceased to circulate as money. Wherefore, defendants claim the benefit of the act of limitation aforesaid.

The provisions of the statute on which this answer is founded, are as follows:

"Section 3. And be it further enacted, that all actions on bonds or other instruments under seal, and all suits for the en-

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forcement of rights accruing to individuals or corporations under the statutes or acts of incorporation, or in any way by operation of law which accrued prior to June 1, 1865, not now barred, shall be brought by January 1, 1870, or the right of the party plaintiff or claimant and all right of action for its enforcement shall be forever barred.

“Section 6. And be it further enacted, that all other actions upon contracts express or implied, or upon any debt or liability whatsoever, due the public, or a corporation or a private individual or individuals, which accrued prior to the first day of June, 1865, and are not now barred, shall be brought by January 1, 1870, or both the right and the right of action to enforce it shall be forever barred. All limitations hereinbefore expressed shall apply as well to courts of equity as courts of law, and the limitations shall take effect in all cases mentioned in this act, whether the right of action had actually accrued prior to the 1st of June, 1865, or was then only inchoate and imperfect if the contract or liability was then in existence.”

The terms of these sections are very broad, but it is claimed by the complainant that they do not apply to bank bills. A recent decision of the supreme court of Georgia, to which our attention has been called, is adverse to this position. In *Kimbro v. The Bank of Fulton*, of which only the head note is furnished, and which is not yet reported in full, it was held as follows: “The general rule is, that statutes of limitation do not apply to bank bills, because they are, by the consent of mankind and course of business, considered as money, and that their date is no evidence of the time when they were issued.

“If bills have ceased to circulate as currency, and have ceased to be taken in and reissued by the banks, they no longer have that distinctive character from other contracts, which excepts them from the operation of the statute of limitations. If the bills of the Bank of Fulton had thus lost their distinctive character prior to the 1st of June, 1865, they come within the provisions of the act of March 16, 1869, entitled ‘An act in relation to the statute of limitations, and for other purposes.’ ”

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The averments of the defendant's plea bring this case within the rule thus laid down. In *Leffingwell v. Warner*, 2 Black, 603, it was held by the United States supreme court that the construction given to a statute of limitations by the supreme court of a state will be followed by the federal courts. We are therefore constrained to hold upon this point with the decision of the supreme court of Georgia. And we may add, that decision has our full concurrence.

It is insisted further, by the complainant, that the bill charges fraud, and the statute does not apply to frauds. Under the general statute of limitations of this state (Irwin's Code, sec. 2880), it is provided that if the defendant, or those under whom he claims, has been guilty of fraud by which the plaintiff had been debarred or deterred from his action, the period of limitation shall run only from the time of the discovery of the fraud. There is no such provision in the act under consideration, and the most the complainant can fairly claim is that the general provision applies. Conceding, as we do, this to be the fact, the complainant fails entirely to bring his case within the exception by the averments of his bill. There is no charge that by the fraud of defendants he has been debarred or deterred from his action.

We think that, by the 6th section of the act, an action on the bills is barred against the bank itself. The terms of this section are as broad as language can make them: "All actions upon contracts, express or implied, or upon any debt or liability whatsoever, due the public, or a corporation or a private individual or individuals, which accrued prior to June 1, 1865, and are not now barred, shall be brought by the 1st of January, 1870, or both the right and the right of action to enforce it shall be forever barred."

This language leaves no loop hole of escape. *A fortiori*, if the action on its bills against the bank itself is barred, an action against the stockholders on the bills, based on the averments made in the bill of complaint, must also be barred.

The complainant assails the statute for unconstitutionality, and criticises its provisions. We think that the details of a

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statute of limitations are wholly within the discretion of the legislative power, with a single limitation only, that no such act can impair the obligation of contracts. The act under consideration provides, that upon all contracts or liabilities which existed prior to June 1, 1865, an action should be brought within nine months and fifteen days from the passage of the act, or be forever barred. Does this impair the obligation of contracts, or is it only a change of the remedy? If the latter, it is not forbidden by the constitution.

It is well established that the legislature may shorten the time for the running of the statute of limitations without impairing the obligation of the contract; that such legislation affects the remedy only.

The only restraint upon this power is, that reasonable time must be allowed, after the passage of the law, to allow the bringing of actions. A limitation, so short as to practically cut off all actions, would affect the contract as well as the remedy, and be void. Here is a statute which applies to contracts and liabilities which had existed nearly four years, and which allowed over nine months in which to bring suit. This appeared to the legislature a reasonable time, and, in regard to the class of contracts to which it applies, it seems reasonable to us. It may be fairly held to change the remedy merely, and not to impair the obligation of the contract.

We are of opinion, then, that the statute pleaded is constitutional; that it bars the claim of complainant, and that the answer setting it up in response to certain parts of the bill of complaint, excuses the defendants from further answer to those portions of the bill.

To that part of the bill which alleges an assignment of the assets of the bank, and calls upon the assignee to account for the trust funds, the defendants set up in their answer the decree of the superior court of Richmond county, which is also mentioned in the bill, distributing the funds of the bank and discharging the assignee. There are no sufficient averments of fraud or collusion, in the bill, to render the decree void; and, as it was a creditor's bill to settle a trust, all creditors are par-

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ties, if they were brought in by publication, according to the laws of Georgia. Story's Eq. Pl., secs. 103, 106.

There is no averment that complainants were not notified, according to law, of the pendency of the bill, nor is a copy of the record attached to the bill. Without other and further averments, we must hold the decree binding on complainants. The setting up of the decree in the answer excuses defendants from further answer to that part of the bill to which the averments relative to the decree apply.

The answer appears to us to be a complete defense to the case made by the bill, and that it is in all respects sufficient.

The exceptions, must, therefore, be overruled.

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JEWETT VS. HONE.

1. In passing upon questions of general commercial law the federal courts are not bound by the decisions of the courts of the state where the contract in question was made or is sought to be enforced.
2. An accommodation acceptor of a bill of exchange transferred before maturity, by the drawers in liquidation of their own preexisting debt, cannot defend an action against him on the bill by alleging that he was an accommodation acceptor only, and that the fact was known to the holders of the bill when they took it.

This case was tried by WOODS, J., and a jury. It went off on the motion of plaintiff to exclude from the jury the evidence offered by defendant to sustain his defense.

*Mr. Thomas M. Norwood*, for plaintiff.

*Messrs. Yates Levy and Geo. A. Mercer*, for defendant.

WOODS, Circuit Judge. This action is brought by plaintiffs as holders, against the defendant as acceptor of a bill of exchange, of which the following is a copy :

" \$2,587.90.

NEW YORK, June 25, 1870.

" Thirty days after date, pay to the order of ourselves, twenty-five hundred and eighty-seven 90-100 dollars, with exchange on New York, and charge the same to account of

" CHRISTOL & STRUTHERS.

" To Mr. WM. HONE, Savannah, Ga."

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The bill was indorsed by Christol & Struthers, and accepted by defendant.

To the declaration upon this bill the defendant has pleaded the general issue, and a special plea to the effect that the acceptance was without consideration and for the accommodation of the drawers, and that the bill was given to the plaintiffs in liquidation of an antecedent debt due from the drawers to the plaintiffs, and that no injury or detriment has accrued to the plaintiffs, or benefit to the drawers or defendant by reason of said acceptance.

The facts about which there is no dispute are in substance these:

On the 25th of June, 1870, Christol & Struthers were a firm doing business in the city of New York. They were indebted to the plaintiffs, John Jewett & Sons, who were pressing them for payment. Christol & Struthers, being unable to pay their indebtedness to plaintiffs, applied to the defendant, William Hone, of Savannah, for assistance, which he assented to give. To this end Christol & Struthers drew the bill in question, which was indorsed by Christol & Struthers and accepted by Hone, who was purely an accommodation acceptor, and received no consideration for his acceptance, and Christol & Struthers agreed with him to pay the bill at maturity.

The bill so indorsed and accepted was before maturity transferred by Christol & Struthers, who were "hard pressed," to the plaintiffs, who were their creditors, "in liquidation of a debt due them," and the plaintiffs "received it for the amount expressed on its face."

Jewett & Sons knew when they received the draft that Hone was an accommodation acceptor.

The question presented by the case should have been raised on demurrer to the sufficiency of the plea. Such demurrer was not filed, and the point in controversy is submitted to the court upon the motion of plaintiff to exclude the evidence of the defendant tending to establish his special plea.

The point for our determination is this: Can an accommodation acceptor of a bill of exchange, transferred before matu-

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rity by the drawees in liquidation of an antecedent debt, set up as a defense to an action against him upon the bill the fact that he was an accommodation acceptor, that fact being known to the holders when they received the bill?

It is claimed by the defendant that the contract sued on is a New York contract, made and to be performed in that state, and that it must be governed by the law of that state. It is further insisted that by the law of New York, as set forth in the decisions of the courts, the facts set up in the special plea would be a good defense to this action, and we are cited to the following cases: *Wardell v. Howell*, 9 Wend., 170; *Rosa v. Brotherson*, 10 id., 86; *Hart v. Palmer*, 12 id., 523; *Root v. French*, 13 id., 570.

Is this court bound by these decisions, admitting that they set forth the settled doctrine in New York? This question was raised, and decided in the negative by the supreme court of the United States in *Swift v. Tyson*, 16 Peters, 1, in which the court says, in referring to the same decisions cited in this case: "It is observable that the courts of New York do not found their decisions upon this point upon any local statute or positive, fixed or ancient local usage, but they deduce the doctrine from the general principles of commercial law. It is however contended, that the 34th section of the judiciary act of 1789, ch. 20, furnishes a rule obligatory upon this court to follow the decisions of the state tribunals in all cases to which they apply. That section provides that "the laws of the several states except when the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in cases where they apply. In order to maintain the argument it is essential therefore to hold that the word 'laws' in this section includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are at most only evidence of what the laws are, and are not of themselves laws. They are often reexamined, reversed and qualified by the courts themselves whenever they are found to

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be either defective, or ill founded, or otherwise incorrect. The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws. In all the various cases which have hitherto come before us for decision, this court have uniformly supposed that the true interpretation of the 34th section limited its application to state laws strictly local; that is to say, to the positive statutes of the state and the construction thereof adopted by the local tribunals and to the rights and titles to things having a permanent locality such as the rights and titles to real estate and other matters immovable and intraterritorial in their nature and character. It has never been supposed by us that the section did apply or was designed to apply to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as for example to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law when the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. \* \* The law respecting negotiable instruments may be truly declared, in the language of Cicero, adopted by Lord Mansfield, in *Luke v. Lyde*, 2 Burr, 883, 887, to be in a great measure not the law of a single country, but of the commercial world: *Non erit alia lex Romæ, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes et omni tempore una eademque lex obtinebit.*"

This extract from the decision of the supreme court of the United States shows conclusively that we are not to be controlled by the decisions of the local tribunals of New York, in passing upon the rights of the parties in this action, even if these decisions were uniform; but they are not.

Thus, in *Warren v. Lynch*, 5 Johns., 239, the supreme court of New York held that a preexisting debt was a sufficient consideration to entitle a *bona fide* holder, without notice, to re-

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cover the amount of a note indorsed to him, which might not, as between the original parties, have been valid; and the same doctrine was held by Mr. Chancellor KENT, in *Bay v. Coddington*, 5 Johns. Ch., 54. And the cases in 10, 12 and 13 Wendell, *supra*, have, by subsequent decisions of the supreme court of judicature of the state, been overruled. *Bank v. Babcock*, 21 Wend., 499; *Bank v. Scoville*, 24 id., 115. We think it clear, therefore, that in determining the liability of the defendant, we are to be guided by the rule of the general law merchant, and not by the shifting and conflicting decisions of any local tribunals.

Do the facts, then, as they appear in this case, constitute a defense to the action?

We think the current and weight of authority sustain the doctrine that a *bona fide* holder, taking a negotiable note in payment of, or as security for a preexisting debt, is a holder for a valuable consideration, entitled to protection against all the equities between the antecedent parties. *Swift v. Tyson*, 16 Peters, 1; *Coolidge v. Payson*, 2 Wheat., 66; *Townsley v. Sumrall*, 2 Pet., 170; *Atkinson v. Brooks*, 26 Vt., 574; *Poirier v. Morris*, 20 Law & Eq., 103; *Petrie v. Clark*, 11 Serg. & R., 377; *Gibson v. Conner*, 3 Kelly, 47.

In *Swift v. Tyson*, the supreme court of the United States says: "It becomes necessary for us, upon the present occasion, to express our own opinion of the true result of the commercial law upon the question now before us. And we have no hesitation in saying that a preexisting debt does constitute a valuable consideration in the sense of the general rule as applicable to negotiable instruments. Assuming it to be true that the holder of a negotiable instrument is unaffected with the equities between the antecedent parties, of which he has no notice, only where he receives it in the usual course of trade and business, for a valuable consideration, before it becomes due, we are prepared to say that, receiving it in payment of, or as security for a preexisting debt is according to the known usual course of trade. \* \* This question has several times been before this court, and it has been uniformly held that it makes no differ-

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ence whatsoever as to the rights of the holder, whether the debt for which the negotiable instrument is transferred to him is a preexisting debt, or is contracted at the time of the transfer. In each case he equally gives credit to the instrument."

In *Atkinson v. Brooks*, 26 Vt., 574, *supra*, the court says: "But it has often been claimed that there is an essential difference in principle between taking a current note or bill in payment and as security for a prior debt then due. The transactions are certainly different in form at least. But it seems to me the ordinary case of taking such a security as payment, or as collateral to the prior debt, is the same in principle. One whose debt is due, in the commercial world, must pay it instantly, or he becomes bankrupt. If instead of money he gives a bill or note, either on time or at sight, whether this is in form payment or collateral to his debt, he gains time and saves the disgrace and ruin consequent upon stopping payment. And in either case there is an implied undertaking that he shall wait upon his debtor till the result of the new security can be known, and in both cases where that proves unproductive, the creditor may pursue his original debt, or he may sue the prior parties on the new security. \* \* According to the general commercial usage there is no essential difference in principle, whether a current note or bill is taken in payment of it as collateral security for a prior debt, provided the note is in both cases truly and unqualifiedly negotiated, so as to impose upon the holder the obligation to conform to the general law merchant in enforcing payment."

In *Percival v. Frampton*, 2 Crompt., M. & R., 180, Parke Baron says: "If the note was given to the plaintiff as a security for a previous debt, and they held it as such, they might be properly stated to be holders for a valuable consideration."

In *Palmer v. Richard*, 1 Eng. Law & Equity, 529, it was held that it was not material whether the note or bill be deposited as security for an advance or in payment.

In *Poirier v. Morris*, 20 Law & Eq., 112, Lord CAMPBELL, C. J., in giving judgment says: "There is nothing to make a difference between this and a common case where a bill is taken

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as security for a debt, and in that case an antecedent debt is a sufficient consideration." In the same case, CROMPTON, J., says: "Whether the bill was a collateral security or whether it had the effect of suspending the judgment of the antecedent debt is quite immaterial." Such is regarded as the settled law in England at the present day, and most of the states of the union have virtually adopted the rule as laid down in *Swift v. Tyson*.

In Georgia, *Gibson v. Connor*, 3 Kelly, 47, expressly decides that taking such paper as collateral security for a prior debt, is sufficient to shut out equitable defenses. See also *Reddich v. Jones*, 6 Iredell, 107; *Allaire v. Hartshorn*, 1 Zabriskie, 665; *Chicopee Bank v. Chapin*, 8 Met., 40; 3 Kent. Com., 96; *Allen v. King*, 4 McLean, 128.

We think that we are justified by the authorities cited, in holding that whether or not Jewett & Sons received the bill in question in absolute discharge of their debt, or as a security merely, they are holders for value. Were they *bona fide* holders without notice? On this point there can be no doubt. It is true that they knew that Hone was an accommodation acceptor, but the paper was transferred to them to accomplish the very purpose Hone had in view in making the acceptance. They are now only calling upon Hone to do what he agreed to do when he put his name upon the bill. To say that because Hone received no consideration from Christol & Struthers for the acceptance, and that plaintiffs knew the fact, does not release Hone, for as we have seen, the plaintiffs took the bill for value. To hold that because Hone was an accommodation acceptor, and the plaintiffs knew it, therefore the bill is not good, would be to strike a fatal blow at all discounts of negotiable securities for preexisting debts. Upon such a doctrine, what would become of that large class of cases where new notes are given by the same or other parties by way of renewal or security to banks, in lieu of old securities discounted by them, which have arrived at maturity?

We are of opinion, therefore, upon the whole case, that the evidence offered to sustain the defense can be of no avail, and we therefore sustain the motion to exclude it from the jury.

# NORTHERN DISTRICT OF GEORGIA.

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AT CHAMBERS, AUGUST 1871.

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**HABEAS CORPUS. Ex rel. WM. B. HOBBS, a white man, and  
MARTHA A. JOHNSON, a colored woman.**

**The marriage relation between white persons and persons of African descent is prohibited, and declared null and void by the law of Georgia: *Held*, that marriage laws are under the control of the states, and that the law named is not annulled or affected by the civil rights bill of congress or the fourteenth amendment to the constitution of the United States.**

The relators were tried before the thirty-fifth senatorial district court of this state in the city of Atlanta, for the offense of fornication.

It appears by the record, that the ordinary of Fulton county, Georgia, on August 31, 1870, issued a license directed to any minister of the gospel, judge of superior court or justice of the peace, to join in the state of matrimony the relators, "provided there is no lawful cause to obstruct the same, according to the constitution and laws of this state."

The following is a copy of the certificate, which is also before me:

"I certify that William B. Hobbs and Martha A. Johnson were joined together in the holy bands of matrimony on the 1st day of September, 1870, by me. OWEN GEORGE."

The parties were severally put upon trial before the state court and pleaded not guilty; and after argument of counsel and charge of the court the jury returned a verdict of guilty against each. Whereupon the court sentenced William B. Hobbs to pay one thousand dollars and costs, or in default to be put to work on the city or town streets or public roads of the

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county for six months from date of the sentence. A similar sentence was passed upon Martha A. Hobbs (alias Johnson), that she pay a fine of two hundred dollars or be put to work, etc., for the term of three months.

At the time the writ of *habeas corpus* was applied for, the relators were in the custody of the jailer of Fulton county. The petition, among other things, stated that the relators were restrained of their liberty in violation of the constitution and laws of the United States. The writ was granted and served by the United States marshal on the jailer, who brought the parties before the United States district judge, and made the proper return upon the writ, and the question of the discharge of relators was heard on the 22d day of August, 1871.

*Messrs. Thrasher & Thrasher and Oglesby*, for relator.

*Mr. W. G. Irwin*, contra.

ERSKINE, District Judge. Counsel for the relators rely upon the fourteenth amendment to the constitution, and the act of congress passed April 9, 1866, commonly known as the civil rights bill. (14 Stat., 27.) The first section of the fourteenth amendment declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The fifth section provides that congress shall have power to enforce the amendment by appropriate legislation.

The civil rights bill was, as may be seen, passed a short time before the fourteenth amendment received the sanction of the people of the United States. In May, 1870, congress passed an act to carry into effect the fourteenth and fifteenth amendments, and by section 18 reenacted the civil rights bill. (16 Stat., 140.)

The first section of this famous bill of rights is as follows:

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“That all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall have the same right in every state and territory in the United States, to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary, notwithstanding.”

The primary, but not the only question presented by the relators for consideration is, whether section 1707 of the code (Irwin's) of Georgia is repugnant to the fourteenth amendment and the civil rights bill, or to either of them — whether it invades or abridges any of the privileges or immunities — fundamental rights — secured to every citizen, by the constitution or the act of congress?

The section referred to is in these words: “The marriage relation between white persons and persons of African descent is forever prohibited, and such marriages shall be null and void.”

This enactment was on the statute book when the state constitution of 1868 was framed. It was said, however, that it was the purpose of the convention to abrogate it by inserting section XI of article I. This is the section: “The social status of the citizen shall never be the subject of legislation.”

But the supreme court of the state, in June, 1869, in *Scott v. The State of Georgia*, 39 Ga., 321, unaimously held that section 1707 of the code was not in conflict with this provision in the state constitution. McCAY, J. (concurring in the judgment of BROWN, C. J., and WARNER, J.), said: “These and such laws have no bearing on the social status of the citizen. They still

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leave persons to choose their associates, though they provide that they shall not enter into a particular civil contract."

This being the law of Georgia — this being the interpretation by the supreme court of the state of a clause in the state constitution — which clause or provision has not been challenged here as being obnoxious to the constitution of the United States — it becomes my duty to ascertain and decide whether section 1707 is an infraction of the fourteenth amendment or the laws of congress made for its enforcement.

Though marriage is not unfrequently viewed in our own country, as well as by foreign jurists, as a contract in the common meaning of the term — and, indeed, it cannot be logically denied that it has, in a limited sense, properties which assimilate it to an ordinary contract, being a consentient covenant — yet it is something more; it is an institution of public concernment, created and governed by the public will of the state or nation. It is a relation which can be annulled only through the intervention of judicial tribunals, unless such power has been also given to the legislature.

Nor, I apprehend, is marriage considered to be embraced within that clause of section X of article I of the national constitution, which prohibits the states from passing any law impairing the obligation of contracts; and Chief Justice MARSHALL, in *Dartmouth College v. Woodward*, 4 Wheat., 518, observes "That the provision in the constitution has never been understood to embrace other contracts than those which respect property or some object of value, and confer rights which may be asserted in a court of justice. It has never been understood to restrict the general rights of the legislature to legislate on the subject of divorces." In another part of the opinion, the same great magistrate said: "The framers of the constitution did not intend to restrain the states in the regulation of civil institutions, adopted for internal government." *Id.*, 629. And Mr. Justice DANIEL, in *Butler v. Pennsylvania*, 10 How., 416, said that "the contracts designed to be protected by the constitution are those by which perfect rights, certain definite, fixed private rights of property are vested." So, on principle

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and authority, it is plain that the institution of marriage is not technically a contract, nor can it be said to relate to property.

The brief remarks on the subject of the marriage relation or *status*, and that it is not within the protection of section X, article I of the original constitution, have been made for the purpose of showing that, as words, as a general rule, are to be taken in their natural and ordinary sense, it is to be presumed that the word "contracts," as employed in the civil rights bill, possesses an equivalent, and not a narrower or broader meaning than the same word as used in the provision of the constitution just referred to. By looking to the act itself, this view will become conspicuously manifest. It provides that the colored citizen shall have the right to make and enforce contracts, sue, be parties, give evidence, inherit, purchase and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by the white citizens — equal privileges and immunities with the white citizen.

In the case of *Live Stock, etc., Association v. Crescent City, etc., Co.*, 1 Abb., 388, which was decided in New Orleans, a few days after the passage of the law reenacting the civil rights bill; but before the reenactment obtained publicity, Mr. Circuit Justice BRADLEY (WOODS, Circuit Judge, concurring) remarked that the civil rights bill was *in pari materia* with the fourteenth amendment, and was probably intended to reach the same object. And he further said, that the court was disposed to hold "that the first section of the bill covered the same ground as the fourteenth amendment — at least so far as the matters in this case are concerned." And, so far as the questions in the case before me are involved, the language of Mr. Justice BRADLEY comes with direct pertinency.

A careful perusal of the amendment and the bill makes it obvious that the design and object of both was, not only to guaranty, in the largest sense, to every citizen in the United States, the sacred right of equality before the law throughout the whole land; but also, to protect from invasion and abridgement all the privileges and immunities — essential rights —

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that belong to the citizen and which flow from the constitution. And I will here remark, that there still lie dormant in the national legislature, under the original constitution and the amendments thereto, vast and various powers which but await such exigencies as are necessary to call them into action.

Any attempt on my part to enumerate or describe the fundamental rights of the citizen comprehended in the words "privileges and immunities," secured by the fourteenth amendment to all the citizens of the United States, would give but an unsatisfactory result. The same words are found in clause 1, sec. II, art. IV of the original constitution. But that clause applies only to citizens removing from one state to another. And the supreme court of the United States, in *Conner v. Elliott*, 18 How., 593, declined to describe or define the word "privileges," saying, "It is safer and more in accordance with the duty of a judicial tribunal to leave its meaning to be determined in each case, upon a view of the particular rights asserted and denied therein."

In *Gibbons v. Ogden*, 9 Wheat., 188, Chief Justice MARSHALL said: "The framers of the constitution and the people who adopted it must be understood to have employed words in their natural sense, and to have understood what they meant." And Judge COOLEY, in his work on Constitutional Limitations, page 59, uses the following clear and attractive language: "Narrow and technical reasoning is misplaced when it is brought to bear upon an instrument framed by the people themselves, for themselves, and designed as a chart upon which every man, learned and unlearned, may be able to trace the leading principles of government."

And now it may be asked, does section 1707 of the Code, conflict with the fourteenth amendment, by abridging any of the privileges or immunities secured therein to the citizens—to the relators, white and colored, or deny to them the equal protection of the laws? Or does it conflict with the civil rights bill? The state law prohibits marriage between a white person and a person of African descent, and declares such marriage null and void. If this prohibition is transgressed, neither pains

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nor penalties follow to either party. But if the parties cohabit, the law of the state deems them guilty of fornication, and punishes them by fine, imprisonment and labor on the public highway, or any one or more of these penalties in the discretion of the court. Code, secs 1707, 4245, 4487.

In *Barber v. Barber*, 21 How., 582, Mr. Justice WAYNE, speaking for the court, disclaimed any jurisdiction in the courts of the United States upon the subject of divorces.

And Mr. Bishop says : "All our marriage and divorce laws \* \* \* are state laws and state statutes; the national courts with us, not having cognizance of the matter within our localities." 1 Bish. on Marriage and Divorce, sec. 87.

I have given the matters involved in this suit careful consideration, and I am of opinion that neither congress, in framing the fourteenth amendment, nor the people, when they ratified it, contemplated that questions of this nature were comprehended within the terms "privileges and immunities" as employed in that instrument. The marriage relation, which is a civil institution, has hitherto been regulated and controlled by each state within its own territorial limits, and I cannot think it was intended to be restrained by the amendment, so long as the state marriage regulations do not deny to the citizen the equal protection of the laws. Nor do I think that the state law operates unequally; the marriage relation between whites and colored cannot exist under the statutes of this state — it is null and void as to both. And the punishment or penalty adjudged to the colored citizen found guilty of fornication is like that — and none other — which is inflicted on the white citizen, the co-offender. In my judgment, neither section 1707, which inhibits marriage between a white person and a person of African descent, nor sections 4245 and 4487 which provide for the punishment of colored and white persons who are found guilty of the crime of fornication, fall within the influence of the provisions contained in the fourteenth amendment or the civil rights bill.

It is therefore ordered that the relators be remanded to the custody of the jailer.

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Hall vs. The Mining Company.

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MARCH TERM, 1873.

## HALL VS. THE YAHOOOLA RIVER MINING COMPANY.

(Before Woods and ERSKINE, JJ.)

1. The "claim law" of Georgia, so far as the same applies to real estate, provides for equitable relief. It is therefore a remedy which cannot be administered in the federal courts, and is not prescribed to be used therein by the act of congress, approved June 1, 1872, entitled "an act to further the administration of justice." (17 Stat., 197.)
2. In Georgia, when the United States marshal levies an execution against A., upon the real estate of B., and threatens to sell the same, B. must file his bill in equity to stop the sale, and cannot resort to the "claim law" of the state for relief.

This cause was submitted on the motion of the plaintiff, who was judgment creditor of the defendant, to dismiss a proceeding, under the claim law of Georgia, commenced by one Vandyke, who set up title to certain real estate levied on by the marshal as the property of defendant, by virtue of an execution issued in this case.

*Mr. Amos T. Akerman*, for the motion.

*Messrs. C. Peebles, George Hillyer and J. A. Wimpey*, contra.

Woods, Circuit Judge. The code of Georgia provides that "when a sheriff or other officer shall levy an execution on property claimed by a third person not party to such execution, such person shall make oath to such property and shall give bond to the sheriff or other officer, as the case may be, with good and sufficient security in a sum double the value of the property levied on, conditioned to pay the plaintiff in execution all damages which the jury, on the trial of the right of property, may assess against him, if it shall appear that said claim was made for the purpose of delay only, and that the said oath and bond, having been delivered to the sheriff or other officer making the levy, it shall be his duty to postpone the sale until otherwise ordered.

"If the person claiming the property shall desire the possession thereof, it shall be the duty of the levying officer to

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take a bond from the claimant in double the value of the property levied on, for the delivery of the property at the time and place of sale, provided the same shall be found subject to the execution, and such bond being delivered to the sheriff, it shall be his duty to leave the property in possession of the claimant.

“When the execution is levied on personal property, it shall be the duty of the levying officer to return the same, together with the execution, to the next term of the court from which the execution issued, but if the execution be levied on real property, the levying officer must return the same with the execution and claim to the next term of the superior court of the county in which the land so levied on shall lie.

“The court to which the claim shall be returned shall cause the right of property to be decided on by a petit jury at the first term thereof, unless continued as other cases at common law, and the jury may give the plaintiff in execution such damages against the claimant, not less than ten per cent., as may seem just, provided it is made to appear that the claim was made for delay only.

“Either party in claim cases may appeal as in cases at common law.” See Irwin’s Code of Georgia, title 9, chap. 1, pp. 707, 708, 709, 710.

By an act approved October 21, 1870, it was provided that “when the claimant is unable to give bond, he may make an affidavit to the effect that he did not interpose the claim for delay; that he claimed title to the property in good faith; that he was advised and believed that his claim would be sustained, and that from poverty he was unable to give the bond as otherwise required by law; and such affidavit, when delivered to the sheriff, shall suspend the sale in the same manner as if bond and security had been given. If the property levied on be personal and the plaintiff claimant unable to give a forthcoming bond, the plaintiff in execution may give such bond; and in that case the levying officer shall deliver the property to said plaintiff; and in the event the claimant is unable and the plaintiff in execution neglects or refuses to give

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said forthcoming bond, the claimant may apply to the ordinary and procure an order for the sale of the same; and said property shall be advertised and sold in the manner prescribed by the law, and the proceeds shall remain in the hands of the levying officer, subject to the order of the court upon the final hearing of the claim." Acts of 1870, pp. 75, 76.

In this state of the statute law an execution was issued on the 28th day of September, 1872, out of the United States court for the northern district of Georgia, upon a judgment for \$2,767, and costs theretofore recovered in that court by Frank W. Hall, against the defendant, the Yahoola River and Cane Creek Hydraulic Hose Mining Company, and the marshal, on the 4th day of October, 1872, levied the execution on certain lands and tenements as the property of the defendant company. Thereupon one M. H. Vandyke, claiming to be the owner of the property so levied on, filed with the marshal the oath and bond required by the above recited acts of the state of Georgia, and the marshal suspended the sale and returned the execution and claim to the court.

A motion is now made to dismiss the claim and to allow the marshal to proceed to sell the property levied on.

The argument of the mover is that the claim law of the state of Georgia is not binding upon the United States courts, and is not adopted by the fifth section of the act of congress, approved June 1, 1872, entitled "an act to further the administration of justice."

That section declares "that the practice, pleadings and forms and modes of proceeding in other than equity and admiralty causes in the circuit and district courts of the United States shall conform as near as may be to the practice, pleadings, forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding." (17 Stat., 197.)

It is obvious to remark that this section excludes from its operation "equity and admiralty causes." The equity practice in the courts of the United States is not controlled by the legis-

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lation of the states or rules of the state courts, but is prescribed by the supreme court.

The distinction between law and equity as recognized in the constitution, and the principles and procedure which at the period of the formation of the constitution so clearly distinguished legal from equitable remedies have not thus far in our judicial history been unsettled by the blending of law and equity in the courts of the United States; they are still administered as distinct systems of remedial justice. Const. U. S., art. III, sec. II.

In *Bennett v. Butterworth*, 11 How., 674, the supreme court declares that "although the forms of proceedings and practice in the state courts shall have been adopted in the circuit courts of the United States, yet the adoption of the state practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in the same suit," and in *Thompson v. Railroad Companies*, 6 Wall., 137, the same court says: "The constitution of the United States and the acts of congress recognize and establish the distinction between law and equity. The remedies in the courts of the United States are at common law or in equity; not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles."

So in *Payne v. Hook*, 7 Wall., 425, it is said that "the equity jurisdiction conferred on the federal courts is the same that the high court of chancery in England possesses, is subject to neither limitation nor restraint by state legislation, and is uniform throughout the different states of the union." To the same effect are the following cases: *Bodley v. Taylor*, 5 Cranch., 191; *Watkins v. Holman*, 16 Peters, 25; *Smith v. McCann*, 24 How., 398; *Loring v. Downer*, 1 McAll., 360.

It follows then from the terms of the 5th section of the act of June 1, 1872, and the authorities cited above, that if the relief sought by the claimant in this case is equitable relief, he cannot resort to the claim law of Georgia to secure it, for

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the mode of proceeding prescribed by that act is a legal and not an equitable proceeding.

When a marshal or sheriff, having an execution in his hands against the property of A., levies it upon the real estate of B., the latter has both legal and equitable remedies. He may sue the officer, or he may bring ejectment after the sale by the officer to recover possession of his property. These are his remedies at law, but neither of these prevents a sale. His equitable remedy is to file his bill setting up his title, and praying an injunction against the officer to restrain him from proceeding to sell,

Now when real estate is levied on, the claim proceeding of the Georgia law is in effect a proceeding in equity. *Cox v. The Mayor*, 17 Ga., 249; *Colquitt v. Thomas*, 8 id., 258; *Williams v. Martin*, 7 id., 380. There is no form of action known to the common law that could stay the sale, and without some statutory provision, the only method of restraining a sale would be by bill in equity. The Georgia claim law therefore, when real estate is levied on, is a substitute for a bill in equity, praying for injunction and relief. It secures equitable relief, prevents irreparable mischief, by a statutory process which provides for a trial by jury. This is a mingling of law and equity not permitted by the constitution and laws of the United States. A party who desires to restrain a sale by the marshal of property levied on by him, and to assert his title thereto, has an equitable case, and must resort to the equity side of the court. As the property levied on in this case is real estate, we are of opinion that the claim law of the state is not applicable, and that the marshal must be ordered to sell, notwithstanding the filing of the affidavit and bond prescribed by the claim law.

Where the property levied on is personal estate, this course of reasoning will not apply. In the case of personal property, there is a remedy at law that would prevent a sale and restore the property to the claimant, namely, the action of replevin. The claim law, therefore, when applied to personal property, may be considered as a substitute for the action of replevin,

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Jack's Case.

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and is not open to the same objection as when real estate is the subject of the levy.

Our conclusion, therefore, is that the claim law of this state can not apply when a levy is made upon real estate; but that it does apply to levies upon personal property. As the levy in this case was upon real property, an order may be entered dismissing the claim of Vandyke, and allowing the marshal to proceed with the sale of the property levied on.

ERSKINE, District Judge, concurred.

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JACK'S CASE

1. Where A., having long since ceased to be a trader, made his note for the payment of an antecedent debt contracted while he was a trader: *Held*, that suspension of payment of the note was not a ground for adjudicating A. a bankrupt.
2. Where, by alleged fraudulent collusion between the petitioner and the defendant, proceedings in involuntary bankruptcy are begun to declare the defendant a bankrupt, judgment creditors, who would be damaged by the adjudication, ought to be allowed to intervene and oppose it.

This was a Petition of Review, filed by Hall & Allin and other judgment creditors of the bankrupt, under the second section of the bankrupt act, to review certain proceedings in the district court sitting in bankruptcy.

*Mr. L. E. Bleckley*, for petitioners.

*Mr. D. F. Hammond*, contra.

WOODS, Circuit Judge. One Er. Lawshé filed a petition in the district court for northern Georgia, praying that Francis M. Jack might be declared a bankrupt, on the sole ground that, being a trader, he had fraudulently stopped payment of his commercial paper, and had not resumed payment of the same within a period of fourteen days.

Before the adjudication, Hall & Allin and L. Schiffer & Nephews, judgment creditors of Jack, applied to the bankrupt

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**Jack's Case.**

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court for leave to intervene and object to the making of any order adjudicating Jack a bankrupt, and alleged the following grounds against such adjudication :

1. That they had unsatisfied judgments against Jack, and had attached his property by garnishment in the state superior court, and had thereby obtained certain rights under the state laws, which would be lost by the adjudication of bankruptcy, and that the estate of Jack was very small and much less than the amount of judgment debts against him, and the proceeding in bankruptcy would, if allowed, illegally dispose of Jack's estate to the great detriment of his judgment creditors ; and

2. Said proceedings were void, because they were begun and carried on by collusion between Jack and Lawshé, the petitioning creditor ; and

3. Because Jack was not a trader at the time of the execution of said note, nor for a long time previous thereto, nor at any subsequent time, but had retired from business entirely, and was hopelessly insolvent at the time of the execution of the note ; and the debt for which the note was given was not in any manner contracted by him in the business of a trader.

The bankrupt court refused to allow the petitioners in review to intervene and object to the adjudication, and proceeded to adjudicate Jack a bankrupt.

The petition of review alleges that the overruling of the motion to allow the petitioners to intervene and object to the adjudication of bankruptcy, and the adjudication itself were erroneous.

The facts alleged in the petition of review, and in the motion of petitioners before the bankrupt court, are not traversed, and we must take them to be substantially true.

If the facts stated in the motion of petitioners had been shown to the bankrupt court, ought that court to have declared Jack a bankrupt ?

Jack, on the 30th of December, 1872, executed his note of that date, payable ten days after date to the order of Er. Lawshé, for \$312.69, at J. H. James' office in Atlanta, Ga.

The note was given for an antecedent debt of two years

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**Jack's Case.**

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standing; for a debt contracted when Jack was a trader; but at the time when the note was executed, and for a long time previous, Jack had ceased to be a trader.

Under this state of facts, could he have been adjudicated a bankrupt, if resistance had been made to the adjudication?

The bankrupt act, section 39, provides: "That any person residing and owing debts as aforesaid (namely, as provided in section 11), who being a trader, has stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days, shall be deemed to have committed an act of bankruptcy." The language of this section clearly indicates that the making of the note must have been done while the party was a trader. A person who having ceased to be a trader, gives a note and suspends payment, does not commit an act of bankruptcy, even though the debt for which the note was given was contracted while he was a trader.

The reason of the law does not apply to such a case. When a man enters the commercial community as a trader or merchant, he assumes all the responsibilities which attach to his calling. One of these is the obligation to pay at maturity his commercial paper. But if he has ceased to be a trader, and has no commercial paper outstanding, he resumes his position with the great mass of mankind, and is subject no longer to the liabilities of a trader. When then he gives commercial paper, he does so subject to the same liabilities as the noncommercial public.

Upon these facts alone then, Jack could not have been adjudicated a bankrupt, if resistance had been made to the order of adjudication.

Should the petitioners, who were judgment creditors, have been admitted to make such resistance? They are conceded to be creditors; it is admitted that they would be subjected to damage by the adjudication; it is admitted that the petition for adjudication was filed by collusion between the bankrupt and the petitioning creditor. We think this makes a strong case for allowing the intervention of these creditors, and they should have been allowed to intervene unless there exists some

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Lockett vs. Hill and another.

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positive rule either of the statute or general orders in bankruptcy which would prevent. I know of no such rule.

In the case of the *Boston, Hartford and Erie Railroad Company*, tried on petition of review before WOODRUFF, circuit judge, and reported in 8 Blatchford, 101, it was held that a petition in involuntary bankruptcy was not a mere suit *inter partes*, but rather partook of the nature of a proceeding *in rem*, in which any actual creditor had a direct interest, and that a party claiming to be a creditor and who was able to satisfy the court that he was a creditor and that his purpose was a meritorious one, ought to be allowed to intervene and object to the adjudication of bankruptcy. The petitioning creditor loses no right by this practice, for if a proper case is made, his debtor will be adjudicated a bankrupt.

I am satisfied with the reasoning of the judge in that case, and think it is an authority entitled to weight.

I am therefore of opinion that the district court erred in refusing to allow the creditors of Jack to intervene and object to the adjudication in bankruptcy, and that on the facts as disclosed by their petition for leave to intervene, Jack ought not to have been adjudged a bankrupt.

The adjudication will therefore be reversed, as well as the order refusing to allow the said creditors of Jack to intervene to object to the adjudication.

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SEPTEMBER TERM, 1878.

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LOCKETT VS. HILL and another.

1. A collateral power, although irrevocable, expires with the life or bankruptcy of the appointor; otherwise is case of a power coupled with an interest.
2. In Georgia a mortgage is merely a security for debt, and passes no title, estate or interest to the mortgagee. Therefore a power of sale in a

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Lockett vs. Hill and another.

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mortgage is not, in Georgia, a power coupled with an interest, but is merely a collateral power.

3. It follows that, in Georgia, a power of sale contained in a mortgage cannot be executed after the mortgagor has been adjudged a bankrupt.
4. Courts will regard fractions of a day when it is necessary to ascertain which of two events first happened. Thus, where a power to sell mortgaged premises was made to the mortgagee, and a lease of the mortgaged premises to a third person was made at the same time, which lease was referred to in the power, the court noticed the fact that the lease was executed previously to the power, for the purpose of ascertaining whether the mortgagee had been actually put in possession of the mortgaged premises or not.
5. If a mortgagee acquire possession of real property after the expiration of a lease made by the mortgagor to a third person, and there is no evidence that the property was rented to him by the mortgagor, he will, in Georgia, be a mere tenant at will or at sufferance.
6. The possession by a mortgagee of the mortgaged premises as tenant at will or at sufferance is not a possession of such dignity as will, in connection with a power of sale granted to the mortgagee, create a power coupled with an interest.
7. Where the power granted to a mortgagee to sell the mortgaged premises is limited to a specified time, if the mortgagee fail to execute it within that time, the power is forever gone.
8. A mortgagee with a power to sell cannot himself become the purchaser, either in severalty, joint tenancy or otherwise. The relations of vendor and vendee cannot thus be united in the same person. Thus, where a mortgage with power of sale was made to an individual, he could not execute the same by selling the mortgaged property to a firm of which he was a member.
9. A mortgagee with power to sell is, in Georgia, a trustee for the mortgagor, his heirs, etc., and as such is accountable in equity; and this, although the power may not be regarded as collateral, but as coupled with an interest.
10. This relation of trustee is not discharged by the bankruptcy of the mortgagor, but, upon the happening of such event, the trustee can no longer be held to account in a state court. The courts of bankruptcy possess a broad and comprehensive authority, sufficiently extensive to enable them, in such cases, to entertain jurisdiction over the rights of the parties, to take possession of the mortgaged property and administer it in accordance with the bankrupt law.

IN EQUITY. Submitted on pleadings and evidence.

*Mr. Ely*, for Lockett, the mortgagee and complainant.

*Mr. Hoge*, the assignee, *in propria persona*, and *Mr. Culberson* and *Mr. Conley*, for both defendants.

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Lockett vs. Hill and another.

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ERSKINE, District Judge. This suit arises out of a mortgage given by Hill, in January, 1871, to Lockett. The bill states that Hill being indebted to Rust, Johnson & Co. (of which firm Lockett was a member), and in settlement and liquidation thereof, drew his draft on Burt, Johnson & Co., payable to his own order, for \$7,451.75, and it was accepted by them and transferred to Lockett; and to secure its payment and in consideration of supplies and money, and to discharge a certain draft in favor of Ketchum & Hartridge, Hill executed the mortgage to Lockett on 1,625 acres of land and certain personal property, and which mortgage contained, among other stipulations, a power to sell the land on nonpayment.

Lockett also alleges that he was placed in possession of the property, real and personal, on the 20th of December, 1871, and continued in possession until he conveyed the land under his power, on the 13th of December, 1873, for \$4,875, to the firm (of which he was then a member) of Rust, Johnson & Co., and that he is still in possession of the personal property.

He prays an injunction against Hoge, the assignee, to restrain him from selling any of the personal property, or interfering with any of the mortgaged property, real or personal; and asks for a subpoena against both Hill, the bankrupt, and Hoge; and the bill prays for "other and further relief."

There is an addendum to the bill — an offer to take the property at a fair valuation to be determined by the court, or to sell the personal property by virtue of his power, and account to the assignee for any surplus; or to surrender the property upon payment of his debt.

The conveyance in mortgage from Hill, the bankrupt, to Lockett, the mortgagee and complainant, was executed on the 16th of January, 1871, by which he conveyed to Lockett a plantation in Dougherty county, in this state, containing sixteen hundred and twenty-five acres, also certain personal property on the land consisting of fourteen mules, all the stock of hogs, cattle, etc., wagons, carts and farming implements, and likewise the crops of corn, cotton and fodder to be raised on the place during the said year 1871; provided, nevertheless, if

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Hill shall pay on or before the 1st day of October, 1871, a certain draft accepted by Rust & Son, and all advances so made during the year for provisions, and shall save Lockett harmless on the Ketchum & Hartridge draft, and all costs, expenses and fees, then the deed to be void, else of full force. The mortgage further stipulates that if Hill shall fail to pay the draft accepted by Rust & Son, at the time and in the manner specified, and also the advances for the present year, then Rust & Son or Lockett shall have the right to foreclose said lien or mortgage on the growing crops and other personal property, in accordance with the statutes of this state. As to the real estate, it is further agreed that Lockett shall have the right to foreclose the mortgage upon the same, or to sell said plantation upon the most favorable terms practicable, either at public sale to the highest bidder, or at private sale, and to account to Hill, after paying off said debts, for the balance; and Hill constitutes and appoints Lockett his attorney in fact, ratifying his acts and doings in the premises, provided, nevertheless, that this power of attorney to convey and make titles shall not operate until after the first day of October next, 1871.

On the 20th of December, 1871, Hill and Lockett entered into a written agreement, under seal, reciting that Hill being indebted to Lockett in a large amount, and to secure the debt, as well as for other purposes, he, on the 16th of January, 1871, executed to Lockett a mortgage to certain property, real and personal, and being still indebted to Lockett in the sum of six thousand seven hundred and thirty-three dollars twenty-three cents with interest from the 1st of December, 1871, at the agreed rate of ten per cent. from said 1st of December until paid; and that, by said mortgage, Lockett had the right to sell the land therein conveyed, but the present not being considered a judicious time to make the sale, it is agreed that Lockett shall take possession of said property, real and personal, and shall have the right to rent the plantation and the personal property in terms this day agreed upon between Lockett and one John La Roque, and that the rent shall be applied to the extinguishment of the debt due by Hill to Lockett; and that during the

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ensuing year (1872), Lockett shall have the right to sell all of the property, both real and personal, mentioned in said mortgage, consisting of the lands mentioned in the mortgage and personal property, this day turned over to La Roque, and apply the proceeds, firstly, to the balance due on the debt above mentioned in this agreement, and secondly, to the payment of the Ketchum & Hartridge draft (provided this draft has to be paid), and Lockett is appointed attorney in fact for Hill, with full power and authority to act as his attorney in fact and to make all needful conveyances.

On the 24th of October, 1873, Hill wrote Lockett that as he was unable to pay him, he might take all the stock, etc., on the land ("all of which is mortgaged to you") at a fair valuation, and credit the same on the debts. There is no evidence that this offer was accepted or rejected. Much was said during the argument as to whether Lockett ever took actual possession of the land and personal property. The evidence read is conflicting. It was, however, agreed by the instrument of December 20, 1871, that Lockett "shall take possession of the said property, real and personal, and shall have the right to rent and hire," etc. By a writing dated December 20, 1871, Lockett rented the "plantation of D. P. Hill," and the personal property thereon, for the year 1872, to La Roque for forty bales of cotton, to be raised on the place and delivered to him. One Blake filed an affidavit stating that he rented the plantation from Lockett for 1873, and paid him the rent, and regarded Lockett as the lawful owner and possessor of said plantation, and held the same as his tenant, and upon delivering the possession to Lockett, he put one White in possession. But he does not positively state that Lockett was at any time in actual possession of the land, and he makes no mention whatever of the personal property. Mr. Ely, solicitor and counsel for Lockett in this cause, swears that he was present on the plantation of D. P. Hill on the 20th of December, 1871, and that in his presence Hill delivered the possession of the plantation to Lockett, and all the personal property thereon. The bankrupt in his answer, read as an affidavit, denies that he ever,

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at any time, turned over the possession of the plantation and personal property to Lockett, but simply authorized him to exercise a supervisory control over the same, in order to protect and further defendant's interests in the way of making crops. He also denies that Lockett rented out the property for 1872 or 1873, but, on the contrary, he says that he rented out the plantation, stock, etc., to La Roque for forty bales of cotton for the rent; but intending that Lockett should have the rents and profits, he caused La Roque to execute the contract with Lockett instead of with himself. He further says that Lockett never gave him (Hill) leave to rent the place for 1873 to Blake, as his (Lockett's) agent; but that he himself rented it to Blake, without obtaining the consent of any one, except that of Blake; but let Lockett collect and retain the rents due by Blake for 1873.

On the 3d of December, 1873, Hill filed his petition in bankruptcy, and was adjudged a bankrupt by Register Black. On the 9th Lockett was, on petition of the bankrupt, restrained from selling the mules, wagons, etc., enumerated in the mortgage; and Edward F. Hoge was appointed assignee of Hill on the 20th; but on the 13th, intermediate the filing the petition in bankruptcy and the appointment of the assignee, Lockett sold the land, in fee, to Rust, Johnson & Co. (the mortgagee himself being the company), for \$4,875, by a warranty deed, executed in the name of Hill, the mortgagor and bankrupt. The deed of conveyance is signed and sealed as follows: "D. P. Hill, [L. s.] by B. G. Lockett, attorney in fact." Hill, in his answer, swears that this land cost him \$16,225 before the war. On the 2d of January, 1874, Lockett instituted the present suit, and by consent, the court granted an order restraining the assignee from selling the personal property until argument could be had on the prayer for injunction, etc. Lockett, by counsel, insisted that by virtue of the power of sale, inserted in the mortgage of January 16, 1871, and in the power of sale in the agreement of December 20, 1871, and by the power of attorney contained in each of these instruments, appointing him attorney in fact to sell, convey and make all needful convey-

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ances, and by the authority given him in the latter instrument to take possession of all the mortgaged property, real and personal, he had a power coupled with an interest, and therefore a perfect right to convey the fee as he had done, and authority to make an absolute sale of the personal property notwithstanding Hill was then a declared bankrupt; and that no part of this property, real or personal, is assets of the bankrupt's estate.

On the part of the assignee it was contended that all said real and personal property is assets of Hill's estate, and that it passed to him by deed of assignment for distribution among the creditors of the bankrupt, under the bankrupt act of 1867 and its amendments.

And for the bankrupt it was urged that he, being the head of a family, is under the first section of the seventh article of the state constitution of 1868, and the state law of the same year (Code, sec. 2002), entitled to a homestead in said mortgaged land to the value of \$2,000 in specie, and exemption in the personal property to the value of \$1,000 in specie.

It is a rule too well settled to need the citation of authorities, that a collateral power, although in many instances irrevocable by the principal, expires with his life or bankruptcy, but it is otherwise when the authority or power is coupled with an interest; for in the latter case it is not extinguished by the death or bankruptcy of the appointor; it survives and may, as a general rule, be executed in the name of the person in whom it was placed. Venerable authority on questions of this nature says that if a person clothed with a power hath at the same time an estate in the land, the power is not collateral because it savors of the land. *Hardres*, 415. And the supreme court of the United States, by Chief Justice MARSHALL, in *Hunt v. Rousmanier*, 8 Wheat., 203, said: "What is meant by the expression 'a power coupled with an interest?' Is it an interest in the subject on which the power is to be exercised, or is it an interest in that which is produced by the exercise of the power? We hold it to be clear that the interest which can protect a power after the death of a person who creates it must be an in-

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terest in the thing itself. In other words, the power must be engrafted on an estate in the thing."

Does the power now in question answer the definition given in *Hardres*, or the equally accurate description given by the supreme court? Had Lockett, at the time when the power was executed, a vested interest or estate in the mortgaged property? Was the power conferred conjoined with an estate, held by Lockett, in the thing itself? "A mortgage in this state is only a security for a debt, and passes no title." Code, 1954. Avoiding unessential matters as far as may be, and matters collateral to the questions for decision, I will quote from or refer to the construction given to this statute by the state supreme court, as found in the reports. In *Davis v. Anderson*, 1 Kelly, 176, WARNER, J., in delivering the opinion of the court, said that "a mortgage in this state is nothing more than a security for the payment of the debt; and the title to the mortgaged property remains in the mortgagor until foreclosure and sale, in a manner pointed out by the statute." \* \* \* "Under our law the legal title to the mortgaged property remains in the mortgagor until after foreclosure and sale." And the interpretation given by that learned judge has been followed from that day to this. See the reports, *passim*. In *Scott v. Warren*, 21 Ga., 408, McDONALD, J., said: "In England and in some of the states of the Union, when the condition is broken, the estate is so absolutely vested in the mortgagee that he may maintain ejectment and recover the premises. This is not the case here. In this state a mortgage in its inception is nothing more than a security for the payment of money, and it so continues to be, and nothing more, after the breach of the condition; therefore, creates a lien only, and not an estate." And this court, in *The United States v. The Athens Armory*, April T., 1868, said: "A mortgage in Georgia is only a security for the debt; the title to the property remains in the mortgagor." This is fully settled as a rule of property by a series of state adjudications, and when such is the case the federal courts adopt the decisions of the state courts.

It has been nearly a century and a half, if my researches

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are correct, since powers of sale, in conveyances in mortgage, were first known to the courts in England. And notwithstanding their validity has been supported in courts of equity, and they have at least impliedly become a part of the jurisprudence of that country, yet as late as 1825, Lord Chancellor ELDON, in *Roberts v. Bozon*, mentioned in 1 Pow. on Mortg., 9, 13, characterized them as extraordinary and of a dangerous nature.

The first reported case in our own country, which I have been able to find on this subject, is *Bergen v. Bennett*, 1 Caines' Cases in Error, 19. This is a bill to redeem on the ground that the power to sell, contained in the conveyance in mortgage, became extinct on the death of the mortgagor. The court for the correction of errors held that the authority to sell was a power coupled with an interest, and dismissed the bill. I will quote portions of the language used by KENT, J., who gave the opinion of the court, and which embody the principal reasons for holding that the power in the mortgage was a power coupled with an interest: "But when power is given to a person who derives under the instrument creating the power, or otherwise, a present or future interest in the land, it is then a power relating to the land. \* \* \* The power now in question answers exactly to this definition" (Hardres, 415) "of a power with an interest, because the mortgagee has, at the same time, a vested estate in the land, and it does not answer at all to the definition of a power simply collateral; for that is but a bare authority to a stranger, who has not, and never had, any estate whatever."

*Wilson v. Troup*, 2 Cowen, 195. This was also a bill to redeem. It was held by the court, as had previously been done in *Bergen v. Bennett*, *supra*, and *Wilson v. Troup*, 7 Johns. Ch., 25, that a power of sale contained in a mortgage is a power with an interest. And the court of errors intimated the opinion that a power of sale inserted in a mortgage was in the nature of a power appendant to the land. A power appendant is where a person has an estate in the land, and the estate to be created by the power is to, or may, take effect in possession during the continuance of the estate to which the power is

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annexed ; as a power to tenant for life, in possession to make leases. Co. Litt., 342, b. n. 298, H. & B. And SUTHERLAND, J., in *Wilson v. Troup*, 2 Cowen, 195, said : " Now, the power of a mortgagee to sell is a power to create or acquire to himself the equitable estate in the land during the continuance of the legal estate conveyed to him by the mortgage."

The validity of the clause of a power of sale inserted in a mortgage has been, as already remarked, established in the courts of chancery at Westminster (Coote on Mortgages, 128 *et seq.*) and also in New York, and indeed in nearly all the states. In New York and in other states the mode of enforcing these power of sale mortgages is in a greater or less degree guarded by statutes, against irregularity and abuse. Such enactments are highly commendable, for it may be borne in mind that the mortgagee holds the antagonistic and anomalous position of creditor and trustee united in himself, and it must often transpire that the time, the place and the manner of selling will present questions of difficulty and importance to the parties. In New York, for example, there must be six months' notice in the public Gazette before the mortgagee can sell under the power of sale. See *Jackson v. Lawson*, 17 Johns., 300.

With these remarks, I will proceed to ascertain whether, under the statute law of this state, and the construction which it has uniformly received by the state supreme court, a power of sale contained in a conveyance in mortgage, executed in this state, is a power coupled with an interest. Directing attention to the cases which have been cited on the subject of a power of sale in a conveyance in mortgage, it will readily be perceived that the decisions of the courts of England and New York, founded on the legal fact that to create a power combined with an interest, the donee must have at the time of the creation of the power a vested estate in the land or thing. Such power may be classed as an appendancy, and the power must have an estate to conjoin with it and nourish it. When this is not the case, the power is simply collateral and ends, at farthest, with the life or bankruptcy of the donor.

In England and in several of the states, including New York

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(and in the latter state at least where the decisions above noted were made), ejectment may be maintained by the mortgagee against the mortgagor on his failure to pay the money at the time stipulated. Whereas, in Georgia, no ejectment or other possessory action on breach of the condition by the mortgagor has been recognized as a part of its jurisprudence. The rule of evidence is, that the plaintiff in ejectment must succeed, if at all, on the strength of his own title, and not on the infirmity of the claim of the defendant. So, too, the claimant, to support his action of ejectment, must be clothed with the legal title to the lands. In *Reed v. Shepley*, 6 Vt., 602, it was resolved that in an ejectment a mortgagor cannot dispute the title of the mortgagee. Thus, in England and in New York and other states of the Union, upon the delivery of the ordinary conveyance in mortgage, an estate or interest passes to and vests in the mortgagee, and such estate being then vested in him, it is sufficient in law upon which to raise a power coupled with an interest; and the estate or interest in the land or thing being in the mortgagee at the time he is clothed with the authority, the estate supports the power and they stand united.

So far as my information extends, the common law doctrine even in its modern and modified form, in relation to conveyances in mortgage, has never met the sanction of the supreme court of this state. Here the rights of parties to these securities for debts, from beginning to end, are regulated and enforced solely by the principles of equity; the very language of the statute is the rule in equity. "A mortgage," says the Code, sec. 1594, "in this state is only a security for a debt and passes no title." As already observed, the state supreme court, in *Davis v. Anderson*, *supra*, said that the title remains in the mortgagor until foreclosure and sale in the manner pointed out by the statute. And McDONALD, J., in *Scott v. Warren*, *supra*, said: "Here a mortgage in its inception is nothing more than a security for the payment of the money, and it so continues to be, and nothing more, after the breach of the condition. The mortgage, therefore, creates a lien only and not an estate; and the mortgagee in relation to the mortgaged property stands on the

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same footing as any other creditor." And this view of the law of mortgages in Georgia was approved by LUMPKIN, J., in delivering the opinion of the court in *Elfe v. Cole*, 26 Ga., 197.

Numerous other cases, containing like views, might be cited, but it is deemed unnecessary to do so. Counsel for complainant read the case of *Robenson v. Vason et al.*, 37 Ga., 66, as affirming and adopting as a rule of decision the doctrine of the courts in Westminster and New York. In *Robenson v. Vason et al.*, the main question before the court was, Whether an injunction which had been granted at the instance of the mortgagor to restrain an innocent assignee of the notes and mortgage from selling the property under a power of sale, given to the mortgagee, his heirs and assigns, was properly dissolved? WARNER, C. J., for the court, held that it was. The chief justice, in the latter part of his opinion, said: "As a general proposition the power to mortgage would seem to include in it a power to authorize the mortgagee to sell in default of payment. *Wilson v. Troup*, 7 Johns. Ch., 32. In this case there is an express power given by the mortgagor to the mortgagee or his assigns to sell the mortgaged property on default of payment upon giving thirty days' notice." I have perused the extended statement of the case made by the reporter, and have not discovered one word in it, nor in the opinion of Chief Justice WARNER, which says or indicates, in the remotest manner, that the authority to sell was a power connected with an interest, and I respectfully hazard the remark that under the facts of that case, as they appear in the report, it could not be a point for decision. The mortgagor was before the court *in propria persona*, and not a declared bankrupt. But notwithstanding the power from the mortgagor to the mortgagee and his assigns was not coupled with an interest, yet it may have been, and probably was, given for a valuable consideration, and consequently, in contemplation of law, irrevocable, but would cease with the life or bankruptcy of the mortgagor. *Walsh v. Whitcomb*, 2 Esp., 565; *Hunt v. Rousmanier*, *supra*. "These powers are not ordinary powers operating by means of limita-

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tion or use, but trusts declared on the legal estate in the mortgage." Hilliard on Mortgages, 138, 3d edition.

I am of opinion that the power of sale contained in the mortgage, or that inserted in the agreement of December 20, 1871, was not, in either instance, under the statute laws of this state or the decisions of the state supreme court, that power which is known in legal language as a "power coupled with an interest."

Adverting to the synopsis of the bill, etc., in a former part of this opinion, in which is embodied the substance of the mortgage of January 16, 1871, and agreement of December 20, 1871, it will be seen that the authority to foreclose, as to the personal property, on default of payment was given to Rust & Son or to Lockett; and the power to foreclose as to the land, or to sell it if the condition was broken, was given to Lockett.

It will be remembered that the mortgage conferred no power to sell the personal property; that authority was given by the agreement. If the authority inserted in the mortgage was a power combined with an interest, it must have been based upon a vested estate in Lockett. He did not foreclose the mortgage upon either the personal or real property, or sell the land after the first of October, 1871 (and which act a proviso in the mortgage authorized him to do if Hill did not pay the money at the time appointed), or before the 20th of December, 1871, on which day the "agreement" was executed. This instrument says Lockett shall take possession of the land and personal property mentioned in the mortgage and rent the same to La Roque, "on terms this day agreed upon between Lockett and La Roque," and it is also stipulated that Lockett "shall have the right during the ensuing year (1872) to sell all of the real and personal property this day turned over to La Roque."

If the power in the mortgage to sell the land after the first of October, should the debts not then be paid, was a power linked with an interest, regranting it by the agreement of December 20, 1871, was notional and superfluous, unless it had previously become extinct by efflux of time or otherwise,

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and the language of the agreement does seem to indicate that it had at that period been extinguished. As just mentioned, it is provided in the agreement that Lockett shall take possession of the mortgaged property, real and personal, and rent and hire the same to La Roque, and Lockett is given the right, during the ensuing year, to sell all of said land and personal property.

Courts disregard fractions or divisions of a day unless it be necessary to ascertain which of two events first happened. And I think it is proper to apply the exception here. It is plain, from the language used in the agreement, that Lockett, before the execution of the agreement, had agreed to rent and hire the mortgaged property to La Roque, and that it had been turned over to him — transferred; these were accomplished facts, effected anterior in time to the delivery of the agreement, though done on the same day. The words are not that Lockett is in possession, but that he shall take possession, etc. In the contract of lease for the mortgaged property made between Lockett and La Roque, it is rented for the ensuing year, 1872, as the "plantation of D. P. Hill." La Roque acknowledges himself as the tenant of Lockett, and signs the lease; Lockett does not sign it. Ely, in his affidavit, says that Hill, on the 20th of December, 1871, delivered the possession of the plantation and all the personal property thereon to Lockett. Hill swears that he never did turn over the possession to Lockett. If the possession was turned over to Lockett on that day — and I express no opinion on the weight of the evidence — the conclusion is that it must have been subsequent, in time, to the execution of the agreement, and consequently after the property had been turned over to La Roque, the lessee. The agreement provides that "Lockett shall have the right during the ensuing year" (1872) "to sell all the real and personal property this day turned over to La Roque." And Hill bestows on Lockett full power to act as his attorney, and to make all needful conveyances. No time was specified in the agreement for the termination of the possession; therefore the law of this state construes it to be for a calendar year. Code, sec. 2290. The agreement,

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as mentioned already, gave him the right during the ensuing year to sell all the real and personal property turned over to La Roque. This power he did not execute during 1872. And, as he must have known the certainty of his own term, he ought to have availed himself of his power to sell the property indicated in the agreement during its continuance; and whether the right to sell within the time named was a naked authority, revocable at the pleasure of the principal, or was a power irrevocable by the grantor, and consequently current until his bankruptcy, or a power coupled with an interest, is here an inquiry of no legal consequence. The right to sell the entire property during the ensuing year was suspended by Lockett beyond the limitation clause in the agreement, and being once suspended by his own voluntary act, it is, in my judgment, gone forever. But as the power of sale was merely cumulative, it would not bar a foreclosure. *Furbish v. Sears*, 2 Cliff., 454. "If a man grant all his trees to be taken within five years, the grantee cannot take any after the expiration of five years; for this is in the nature of a condition annexed to the grant." Moore, 882.

Lockett alleges that Hill, as his agent, rented the property to Blake for the year 1873. Hill says he rented it to Blake himself, but allowed Lockett to receive the rent, to be applied in discharge of the debt due him. Blake avers that he rented the plantation from Lockett for 1873, paid him the rent and surrendered the place to him, and he put White in possession. Lockett says he has been in possession of all the mortgaged property from the 20th December, 1871, until he sold the land, shortly after the bankruptcy of the mortgagor, and is still (2d January, 1874) in possession of the personal property. Let it be conceded that Lockett was in possession, though there is no evidence in the record that Hill rented him the property for 1873, so then he must have been in as a tenant at will or at sufferance. The possession as a tenant at will, or at sufferance, would not be of that dignity and nature which could be engrafted on a power in a mortgage in fee so as to make it a power coupled with an interest; it would not bring

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the power within the definition given in *Hardres*, or by Chief Justice MARSHALL, of a power coupled with an interest.

If the power of sale given to Lockett was what I have ruled it to be, a collateral power, then it became extinct, at farthest, on the bankruptcy of Hill, nine or ten days prior to the sale of the land by Lockett. But if it was really a power united with an interest, then it survived his bankruptcy, and Lockett could (were it not for reasons which will be explained presently) have conveyed the property in his own name, but not, as he ventured to do, in the name of Hill, who was at the time *civiliter mortuus*—at least he was incapable in law to execute a deed of conveyance. And assuming the power conferred to be of the latter kind, still Lockett could not purchase this land himself, either in severalty, joint tenancy, or otherwise; he could not be vendor and vendee; the characters are inconsistent. *Michoud et al v. Girod et al*, 4 Howard, 502; *Griffin v. Marine Company*, 52 Ill., 130.

The remaining question which I shall now consider—and it is a question of importance in this case—springs from the record. Let the fact be yielded that the power granted by Hill, the mortgagor, to Lockett, the mortgagee, was a power connected with an interest, and consequently not revoked by the bankruptcy of Hill, nor shall I presume it to have been lost previously by the laches of Lockett, the donee, in not selling the property within the time limited, could he, by virtue of such power of sale, convey the land to himself or any one else, after Hill had been adjudged a bankrupt under the provisions of the bankrupt act of 1867, unless the sale was made by the order and authority of the district court? Now, although Lockett may have, by a clause in the mortgage or agreement, received a power coupled with an interest, yet, after all, he would be but a trustee for Hill, the mortgagor, his heirs or assigns; for neither the mortgage, the agreement, nor the power (even if coupled with interest) invested him with an absolute and indefeasible estate in the property which is the subject of this controversy; and as agent or trustee for the mortgagor, his heirs, etc., a court of chancery could compel him to account

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for the rents and other fruits of the mortgaged property. Did the bankruptcy of Hill discharge or in any manner lessen the responsibility of Lockett as trustee? Surely not. True, when Hill became a bankrupt, Lockett was no longer liable to account directly to him; for the moment he filed his petition in the district court under the bankrupt act, all his estate, of every kind and description, in possession or in action, came by the mere operation of the bankrupt law into the possession of that court, and under its immediate control; and no state court, nor person can interfere with the possession except by permission of this court. *In re Steadman*, 8 N. B. R., 319. It is declared by the first section of the bankrupt act, that the jurisdiction of the United States district courts, acting as courts of bankruptcy, shall extend "to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of the liens and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all parties; and to the marshaling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors." Thus it will be seen that the congress of the United States has conferred on the bankruptcy courts a broad and comprehensive authority, sufficiently extensive for those courts to entertain jurisdiction over the respective rights of the parties in and to the property, real and personal, which was mortgaged by Hill to Lockett, and to cause it to be administered in accordance with the bankrupt law.

Hill, the bankrupt, appears on the face of the bill as a party defendant; but whether he is a proper party need not now be inquired into; he appeared and responded to the allegations and charges in the bill.

The prayer for the writ of injunction is refused; and the order previously granted restraining the assignee from selling the personal property is hereby set aside.

Ordered accordingly.

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The United States vs. Muhlenbrink.

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## THE UNITED STATES VS. MUHLENBRINK.

(Before Woods and ENSKINE, JJ.)

1. The suspension of the statute of limitations provided for by the act of congress, approved June 11, 1864 (13 Stat., 123), did not continue in Georgia after the proclamation of the president, of April 2, 1866.
2. The fact that no term of the United States court for the northern district of Georgia was held until September 10, 1866, and no clerk of that court appointed until that date, did not continue the suspension of the statute until that time.

This cause was submitted upon the motion of defendant, Hans Muhlenbrink, for a new trial.

*Mr. Geo. S. Thomas*, Assistant U. S. Attorney, for plaintiff.  
*Messrs. L. E. Bleckley and L. J. Gartrell*, for defendant.

WOODS, Circuit Judge. This action was brought on the 19th of January, 1867, on the official bond of William T. Wilson, as postmaster of Atlanta, on which defendant Muhlenbrink was one of the sureties. Wilson died before suit brought, and the other surety was never served with process; Muhlenbrink was therefore sole defendant.

He plead that the default of Wilson occurred on the 31st of December, 1859, and that the suit was not brought within two years after the cause of action accrued.

The plaintiff replied that said default did not occur more than two years before the commencement of the action, after deducting the time during which the state of Georgia was in rebellion, and during which the ordinary course of judicial proceedings in the state was interrupted in consequence of the rebellion, and that the rebellion and interruption of judicial proceedings continued from the 19th of January, 1861, to the 10th day of September 1866.

To this replication the defendant rejoined that after the default there was an interval of more than two years before the commencement of the action, after allowing all proper deductions of time for the causes mentioned in the replication.

Upon this the plaintiff took issue, the parties went to trial

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and the jury returned a verdict for plaintiff in the sum of \$5,198 principal, and \$50 interest.

The court charged the jury that in computing the time during which the statute of limitations had run against plaintiff's cause of action, the period between the 19th of April, 1861, and the 10th of September, 1866, should be excluded.

Defendant Muhlenbrink claims that this charge was erroneous, and on that sole ground moves for a new trial.

The question presented for decision is this: How long was the running of the statute of limitations obstructed between the 31st day of December, 1859, the date of the default of Wilson, and the 19th day of January, 1867, the date of the commencement of the action by reason of the matters alleged in the plaintiff's replication?

In the state of Georgia, the late war of rebellion began on the 19th of April, 1861, the date of the proclamation of blockade in that and six other states (12 Stat., 1258), and ended by the proclamation declaring the war closed on the 2d of April, 1866 (14 Stat., 811); *The Protector*, 12 Wall., 700.

If the running of the statute of limitations was suspended only during the period of actual war, as that period was defined in the case of *The Protector*, namely, between the 19th of April, 1861, and the 2d of April, 1866, then the bar intervened before the bringing of this action, two years, one month and six days having elapsed, exclusive of the period aforesaid, after the default and before the bringing of the suit.

But it is claimed in behalf of plaintiff, that all the time, from the beginning of the war on April 19, 1861, to the commencement of the first term, after the war, of the United States court for the northern district of Georgia, on September 10, 1866, should be included in the period during which the statute was suspended. To support this claim, reliance is placed on the act of congress approved June 11, 1864 (13 Stat., 123).

This act declares that, "whenever, during the existence of the present rebellion, any action, civil or criminal, shall accrue against any person who, by reason of resistance to the execution of the laws of the United States, or the interruption of

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the ordinary course of judicial proceeding, cannot be served with process for the commencement of said action or the arrest of such person ; or whenever, after such action shall have accrued, such person cannot, by reason of such resistance to the execution of the laws of the United States, or such interruption of the ordinary course of judicial proceedings, be arrested or served with process for the commencement of the action, the time during which such person shall be so beyond the reach of legal process shall not be deemed or taken as any part of the time limited by law for the commencement of the action." (13 Stat., 123.)

The claim is put forward that, because no term of the federal court was held in northern Georgia until September 10, 1866, therefore there was such an interruption of the ordinary course of judicial proceedings as prevented the service of process.

As a matter of fact, Were the United States courts closed in Georgia until the 10th of September, 1866, as a consequence of the rebellion? We think that public history, the proclamations of the president, and the conceded facts in this case, show that such was not the case.

On the 17th day of June, 1865, President Johnson issued his proclamation appointing James Johnson provisional governor of Georgia, and directing that the district judge for the judicial district in which Georgia is included, proceed to hold courts within said state, in accordance with the provisions of the act of congress, and that the attorney general instruct the proper officers to libel and bring to judgment, confiscation and sale property subject to confiscation, and enforce the administration of justice within said state in all matters within the cognizance and jurisdiction of the federal courts. (13 Stat., 764.)

On the 2d of April, 1866, the president issued his proclamation declaring that "no organized armed resistance to the authority of the United States existed in the state of Georgia, and that the laws could be sustained and enforced therein by the proper civil authorities, and that the people of said state were well and loyally disposed." (14 Stat., 812.)

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The conceded facts are these:

The last term of the United States court, for the northern district of Georgia, held before the passage of the ordinance of secession, began in September, 1860, and no other term of the court was held until the 10th day of September, 1866. JOHN ERSKINE was commissioned United States judge, for the districts of Georgia, on July 10, 1865, and soon after qualified and entered upon the discharge of his duties. A marshal was appointed during the same year, for the two districts into which the state was divided; but no clerk was appointed for the northern district until the 10th day of September, 1866.

The first term of a United States court actually held in Georgia after the rebellion was held in the southern district, at Savannah, in May, 1866, and on the 16th of that month the judge, sitting in chambers at Savannah, made an order in a cause pending in the northern district.

The state courts were opened for the administration of justice in the fall of 1865, and thence forward continued in the uninterrupted discharge of their duties.

The failure of the judge to appoint a clerk is not one of the causes named in the act of congress, the existence of which suspended the running of the statute. It was the impossibility of serving process, arising from resistance to the execution of the laws, or the interruption of the ordinary course of judicial proceedings during the existing rebellion, that suspended the running of the limitation, and that alone.

Lord COKE in his First Institute, vol. 3, page 40, says: "And therefore when the courts of justice be open, and the judges and ministers may, by law, protect men from wrong and violence, and distribute justice to all, it is said to be a time of peace. So when by invasion, insurrection, rebellion or such like, the peaceable course of justice is disturbed and stopped, so as the courts of justice be as it were, shut up, *et silunt leges inter arma*, then it is said to be time of war. And the trial hereof is by the records and judges of the courts of justice, for by this it will appear whether justice had her equal course of proceeding at that time or no, and this shall not be tried by a jury."

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Tested by this passage, it seems to us that the courts of the United States were open in northern Georgia at least as early as April, 1866. The records of the court, the proclamations of the president and the public history, of which this court will take judicial notice, all concur in establishing the fact that, at and before that time the rebellion was subdued, the war over, peace returned, resistance to the laws at an end, and the ordinary course of judicial proceedings reestablished. If the suit of the plaintiff could not then have been brought, it must have been for some other reason than those named in the act of congress.

When peace and order are restored, and judicial officers appointed, the suspension of the statute of limitations does not continue until it shall be convenient for them to act. Peace opens the courts, and a reasonable time after the end of actual hostilities having passed for the courts to resume their functions, the suspension of the statute of limitations must cease.

As this action was not commenced within two years after the default, making all proper allowances for the suspension of the statute of limitations, we think the action was barred, and that a new trial ought to be granted.

ERSKINE, District Judge, concurred.

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**EARNEST VS. THE EXPRESS COMPANY.**

(Before Woods and ERSKINE, JJ.)

1. A common carrier may by contract limit his common law liability, but he cannot contract for immunity from liability for his own negligence or misconduct.
2. Common carriers have a right to demand good faith and fair dealing from those whom they serve. So where by notice brought home to a shipper, an express company made known that it would not be liable to a greater amount than fifty dollars for the loss of unvalued packages, and the shipper to avoid paying the regular charges of the company failed to disclose the value of a package delivered for carriage, and led the company to treat it as of small value, whereby it was lost, it was held that the shipper could only recover fifty dollars, although the package was of much greater value, and although the company, had the value of the package been made known to it, might have been considered guilty of negligence.

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This cause was tried at the September term, 1873, by ERSKINE, district judge and a jury. There was a verdict for plaintiff for fifty dollars. At the same term a motion for new trial made by plaintiff was argued before WOODS, circuit judge and ERSKINE district judge.

*Messrs. E. N. Broyles and Reuben Arnold, for the motion.*

*Mr. N. J. Hammond, contra.*

WOODS, Circuit Judge. The evidence upon the trial as appeared by the brief thereof agreed to by counsel, established these facts.

The plaintiff was a jeweller in the city of Atlanta in the habit of sending to and receiving from New York City valuable packages by express. He was furnished by the express company with a book containing the blank receipt of the company. On the 8th of February, 1869, he went to the agent of the defendant in Atlanta, with a small package containing four diamond rings valued at \$735. The package was a paper box about three inches long by two and a half wide and was covered with brown paper and directed to a firm in New York. There was no value stated upon the package nor other mark to indicate its value. The plaintiff when he delivered the package to the defendant's agent presented one of the defendant's receipts which he had taken from the book furnished by the express company and had filled up in his own hand. This receipt read as follows:

"Read this receipt. Southern Express Company. Express forwarders. Domestic bill of lading. Atlanta, February 8, 1869. Received of E. E. Earnest, package valued at (not given) dollars, and for which amount the charges are made by said company, marked S. & M. N. Strauss, New York."

Then followed several printed stipulations among which were the following: "It is a part of the consideration of this contract and it is agreed that the said 'express company are forwarders only, and are not to be held liable or responsible for any loss or damage to said property while being conveyed by the carriers to whom the same may be by said ex-

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press company intrusted or arising from the dangers of railroads, ocean or river navigation, steam, fire in stores, depots or in transit, leakage or breakage, or from any cause whatever, unless in every case the same be proved to have occurred from the fraud or gross negligence of said express company or their servants, unless specially insured by it and so specified on this receipt, which insurance shall constitute the limit of the liability of the Southern Express Company in any event; and if the value of the property above described is not stated to the shipper at the time of shipment and stated in the receipt, the holder hereof will not demand of the Southern Express Company a sum exceeding fifty dollars for the loss or damage to each package herein receipted for."

The receiving agent of the defendant asked the plaintiff the value of the package, and he refused to give it. The charge upon the package for transmission to New York was one dollar. If the value had been fixed, there would have been an additional charge of one-half of one per cent., amounting to three dollars and a half and upwards. The plaintiff had been frequently informed by defendant's agent of this rule in reference to additional charges on value.

The contents of the package and its value remained unknown to defendant's agent.

The defendant's agent upon the refusal of plaintiff to make known the value of the package, stated to plaintiff that the express company would not be liable for more than fifty dollars on the package unless he fixed a value, which proposition the plaintiff disputed and claimed the law to be otherwise; whereupon his attention was called to the clause in the receipt bearing upon that point.

Valued packages delivered to defendant for transportation are put in sealed pouches and these pouches in an iron safe, and the messenger receiving the pouch receipts for it to the one delivering it. Unvalued packages for convenience merely and not for security, are placed in a wooden box, and there is no rule of the company to prevent throwing them upon the floor of the car. They are delivered from one messenger to

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another, the latter simply receipting the way bill and receiving the goods in bulk.

The package in question was safely carried as far as Dalton, Georgia, as an unvalued package. It was there delivered to a second messenger to be transferred with other express freight to another car. When the second messenger before starting examined the packages transferred to his own car to see if they were all there, this package was missing. There was some testimony tending to show that in the transfer of the express freight from one car to another, this package was stolen by one Green, who assisted in making the transfer.

Green was not in the employ of either the railroad or express company, but was the servant of the express agent at Dalton, and sometimes assisted in transferring heavy express freight from one car to another.

The express messenger at Dalton who delivered the package and the one who received it, both testified that they were careful and diligent in the discharge of their duty touching this package, supposing it to be one not worth more than fifty dollars, and there was no evidence to rebut this proof except the fact of the loss of the package.

The jury returned a verdict of fifty dollars for the plaintiff, and the plaintiff now moves for a new trial on the ground that upon the facts the verdict should have been for the value of the diamonds.

A motion for a new trial is addressed to the sound discretion of the court, and if upon a review of the case the court is of opinion that substantial justice has been done, and a correct result reached by the verdict, a new trial will not be granted, even though there may have been error in the progress of the trial.

Proceeding upon this principle, we have considered the case as presented by the agreed facts, to determine whether the verdict is right or wrong, and have reached the conclusion that it is right and ought not to be disturbed.

The modern doctrine both in England and this country is now well settled, that a common carrier may by express con-

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tract, or by notices brought home to the knowledge of the owner of the goods before or at the time of delivery to the carrier, if assented to by the owner, limit his common law liability.

"As the extraordinary duties annexed to his employment concern only in the particular instance the parties to the transaction, involving simply rights of property, the safe custody and delivery of the goods, we are unable to perceive any well founded objection to the restriction or any stronger reasons for forbidding it, than exist in the case of any other insurer of goods to which his obligation is analagous and which depends altogether upon the contract between the parties.

"The owner by entering into the contract virtually agrees that in respect to the particular transaction the carrier is not to be regarded as in the exercise of a public employment, but as a private person who incurs no responsibility beyond that of an ordinary bailee for him, and answerable only for misconduct or negligence." NELSON, J., in *N. J. Navigation Co. v. Merchants' Bank*, 6 How., 382. See also *Sager v. P. S. & P. Railway*, 31 Me., 228; *Bean v. Green*, 12 id., 422; *Cooper v. Berry*, 21 Ga., 526; *Dorr v. N. J. Steam Nav. Co.*, 1 Kernan, 485; *Atwood v. The Reliance Co.*, 9 Watts, 87; *Vernier v. Sweitzer*, 32 Penn. St., 208; *Parsons v. Monteith*, 13 Barb., 358; *Moore v. Evans*, 14 id., 524.

It is generally held, however, in this country that a common carrier cannot, by special notices brought to the knowledge of the owner of the goods or by contract even, exempt himself from the duty to exercise ordinary care and prudence in the transportation of goods. *Cole v. Goodwin*, 19 Wend., 251; *Atwood v. Reliance Co.*, 9 Watts, 87; *Camden & Amboy Railroad Co. v. Bauldoff*, 16 Penn. St., 67.

According to the agreed facts in this case, the stipulations of the receipt were brought distinctly to the knowledge of the defendant. After presenting the receipt filled out by his own hand he was informed by the agent of defendant that, unless he stated the value of the package, the defendant would only be liable for \$50. This the defendant disputed, when the agent called his attention specially to the provision to that effect in

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the receipt. Instead of demanding that such stipulation be stricken out, he accepted the receipt as it stood. According to the authorities, this amounted to a contract between the plaintiff and defendant.

The point urged by the plaintiff is this: The jury, having found a verdict in his favor for fifty dollars, must have been satisfied either of the negligence of the defendant, or that a servant of the defendant had converted the goods, and that the verdict should therefore have been for the full value of the package. In other words, that if the defendant cannot, by contract, exonerate itself from liability for its negligence, neither can it contract that in case of negligence it shall be liable for less than the real damage sustained.

We do not think it follows, from the finding of the jury, that the verdict should have been for the full value of the package. The negligence found by the jury was negligence in handling a package supposed to be worth not more than fifty dollars, and, in effect, represented to be of that value, and no more.

While it is conceded that a common carrier cannot protect himself, by contract, from liability to pay full damages in case of negligence, yet he may, by contract, require a full disclosure of value, and his case is to be judged just as if the value represented were the true value. What would be diligence, in the care of an unvalued package, might be gross negligence in the care of one worth a thousand dollars.

The authorities sustain these views. In the case of *The Bank v. Champlain Transportation Company*, 23 Vt., 186, the court said: "But we regard it as well settled, that the carrier may, by general notice brought home to the owner of the things delivered for carriage, limit his responsibility for carrying certain commodities beyond the line of his general business, or he may make his responsibility dependent upon certain conditions; as having notice of the kind and quantity of things deposited for carriage, and a certain reasonable rate of premium for the insurance, paid beyond the mere expense of carriage."

So Mr. Greenleaf, in his treatise on the Law of Evidence,

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vol. 2. sec. 215, declares: "It is now well settled that a common carrier may qualify his liability by a general notice to all who may employ him, of any reasonable requisition to be observed on their part in regard to the manner of delivery and entry of parcels, and the information to be given to him of their contents; as, for example, that he will not be responsible for the value of goods above a certain sum, unless they are entered as such and paid for accordingly."

In *Batson v. Donovan*, 4 Barn. & Ald., 21, the court held that "the plaintiff, by delivering a box containing bills, checks and notes to the value of £4,072, without intimating that the contents were valuable, when he knew the carrier expected a premium for insurance in such cases, was guilty of such fraud and deception as to preclude a recovery except for such gross neglect as would be reprehensible if the parcel had been of less value than £5, the limit named in the carrier's notice." See also *American Express Co. v. Perkins*, 42 Ills., 458; *Relf v. Rupp*, 3 Watts & Serg., 21.

If public policy allows a common carrier to make such a contract, it must be enforced. Common carriers have a right to demand good faith and fair dealing from those who do business with them. It strikes the common sense as a gross injustice that a party who, to avoid paying the regular charges therefor, conceals the value of a package, and thereby throws the carrier off his guard, and induces him to treat the package as of small value, whereby it is lost, should recover its full value when he has expressly agreed, in case of loss, that he would only demand a stated sum, much less than the true value.

That is the case here. It is evident from the facts that if the value of the package had been stated, it would not have been lost. It would have been put in a pouch, and the pouch in an iron chest. The package, being unvalued, was supposed to be of little value, and was treated as such by the carrier. He was induced to relax the care and vigilance he would have used had the package been marked with its true value. By reason of that relaxation, the package was lost. Its loss is the direct consequence of the conduct of the defendant in refusing to give

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its value in order that he might escape the payment of full charges. He has agreed that in case of loss his compensation therefor should be fifty dollars, and he is bound by his contract.

There is a plain, well understood contract between these parties. If such contracts are ever to be enforced, we see no reason why this one should not be. We think the verdict of the jury does substantial justice between the parties, and ought to stand.

The motion for new trial will therefore be overruled.

# SOUTHERN DISTRICT OF ALABAMA.

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DECEMBER TERM, 1869.

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THE UNITED STATES VS. IMSAND.

1. The last clause of the 78th section of the act of congress, approved July 20, 1868, entitled an act imposing taxes on distilled spirits and tobacco (15 Stat., 159), contains no exception so incorporated in the body of the enactment that it must be negatived in an indictment founded on the clause.
2. The presumption of guilty intent cannot be rebutted by proof of declarations of the accused made after the commission of the offense.

The jury by which this cause was tried, having returned a verdict of guilty, a motion was made in arrest of judgment, "because there is an exception in the section upon which the indictment is founded, so incorporated with the enacting clause, that one cannot be read without the other, and in such cases the exception must be negatived in the indictment, which in this case is not done."

*Mr. J. P. Southworth*, U. S. Attorney, for the United States.

*Mr. John Little Smith*, for the defendant.

WOODS, Circuit Judge. The rule requiring exceptions in a statute to be negatived in an indictment has been well expressed in these words: "If there is an exception in the enacting clause, the party pleading must show that his adversary is not within the exception, but if there be an exception in a subsequent clause or subsequent statute, that is matter of defense, and is to be shown by the other party." 8 Am. Jurist, 284.

For example, the statute, 19 Geo. II, ch. 30, part 1, enacts, that no mariner who shall serve on board any privateer em-

ployed in the British sugar colonies in the West Indies, nor any mariner being on shore in said colonies shall be liable to be impressed by any officer of a ship of war, unless such mariner shall have before deserted from an English ship of war. A penalty of £50 was given by the same statute to any person who should sue therefor against any officer who should impress a mariner contrary to its provisions. In an action on this statute, judgment was arrested because the declaration did not allege that the mariner had not previously deserted from any of his majesty's ships of war. *Spieres v. Parker*, 1 Term, 141. In this case it was said, that the penalty was not imposed for impressing a mariner in the sugar colonies, but for impressing a mariner there who had not previously deserted; that the word *unless*, in the statute, had precisely the same sense and operation as if it had been in so many words enacted, that the penalty should be inflicted on any officer who should impress a mariner who had previously deserted.

So in *Gill v. Scrivens*, 7 Term, 27, Lord KENYON said, "the writ ought to state all the circumstances that entitled the plaintiff to execution;" and Lord MANSFIELD said, "the plaintiff must aver a case that brings the defendant within the statute."

A statute of Massachusetts forbids labor and traveling on the Lord's day, except from necessity or charity. Labor or traveling merely is not forbidden, but unnecessary labor and traveling, and labor and traveling not required by charity. The exception is in the enacting clause, and the absence of necessity and charity is a constituent part of the description of the acts prohibited, exactly as if the statute had *in totidem verbis* forbidden unnecessary labor and traveling, and labor and traveling not demanded by charity.

An English statute makes it a penal offense for any person other than those employed in his majesty's mint, to make or mend any instrument for coining. This exception must be negatived in an indictment. The want of such authority is part of the description of the offense itself. 1 East's Pleas of the Crown, 167.

These examples are sufficient to illustrate the meaning and

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reason of the rule. The reason is simply this, that unless an exception in an enacting clause is negatived in pleading the clause, no offense appears in the indictment. The case provided for in the clause pleaded is not made out on the record.

It is only when the matter is such that its affirmation or denial is essential to the apparent or *prima facie* right of the party pleading, that it must be affirmed or denied by him in the first instance.

Now, to apply the doctrine to the case at bar. This indictment is founded on the last clause of section 78 of the act of congress, approved July 20, 1868. (15 Stat., 159.) This section contains three distinct clauses. The first provides that every dealer in manufactured tobacco and snuff shall, on the first day of every month, make and return to the assistant assessor of the proper division, an inventory of the tobacco and snuff which he has on hand at the time; the second clause provides that after Jan. 1, 1869, all smoking, fine cut chewing tobacco and snuff, and after July 1, 1869, all other manufactured tobacco shall be taken and deemed to have been manufactured after the passage of this act, and shall not be sold or offered for sale unless put up in packages and stamped, as prescribed by this act, except by retail dealers from wooden packages, stamped as provided by this act. The evident purpose of this clause is to make uniform in practice, at as early a day as possible, the provisions of the law regulating the tax on tobacco. In a previous section of the act, section 62, it had been provided that after the passage of the act, all manufactured tobacco should be put in certain described packages, fine cut tobacco in packages weighing  $\frac{1}{4}$ , 1, 2, 4, 8 and 16 ounces, or in wooden boxes containing 10, 20, 40 and 60 pounds each, and all such packages should be stamped. Now this second clause put the law in force so far as fine cut tobacco or snuff is concerned, on January 1, 1869, by creating the presumption, after that day, that such tobacco and snuff were manufactured after the passage of the act, whether such was the actual fact or not, and prescribes that no such tobacco shall be sold unless in packages and stamped as required by the act; but allows retail dealers to

sell at retail from the wooden packages stamped as provided for by the act.

The third clause provides that after the first day of January, 1869, any person who shall sell, or offer for sale, any smoking, fine cut chewing tobacco or snuff, not so put up in packages and stamped, shall, on conviction, be fined, etc.

This last clause it seems to me, contains no proviso or exception, and this is the clause on which the indictment is found. It is complete in itself, except only that it refers to the second clause by the words, "so put up in packages and stamped." But the second clause does not inform us how the tobacco is to be packed and stamped, but refers to the previous section (sec. 62). So that this third clause may well be construed as if it read "as provided in section 62." There is nothing excepted from the operation of this clause; all tobacco must be packed and stamped as provided by the act, and to sell any tobacco not packed and stamped is made an offense by this clause of the statute.

But there is not even in the second clause of this section, any exception to the provisions of the act that all tobacco sold must be packed and stamped in a certain way. What is relied upon as an exception in the second clause is simply a permission to retail dealers to sell in a certain way not unstamped tobacco, but tobacco put up in a prescribed way and duly stamped.

If the third clause of the section had provided that it should be unlawful to sell tobacco unless stamped, but that tobacco manufactured, say before 1869, or tobacco manufactured at Lynchburg, Virginia, might be sold without stamps, then it would be necessary in an indictment under this clause, to negative these exceptions. But this clause does not make these exceptions, or any others. All tobacco sold must be packed and stamped as prescribed, and the sale of any tobacco not so packed and stamped is made an offense. Nor does the second clause make an exception. It simply provides that certain persons may sell tobacco packed and stamped, as provided by law, in a certain way, but they are nowhere in the section authorized to sell to-

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bacco unstamped. It introduces no new element or qualification into the offense, but leaves it just as broad and unqualified as the third clause leaves it.

So that when this indictment alleges that on a certain day, and at a certain place, the accused sold tobacco which had not paid the revenue tax, and was not stamped as provided for by law, it describes fully and completely an offense under this statute. There is no exception to be negatived, because the law makes no exception.

Therefore for the reason, first, that no exception is made in the clause on which the indictment is based; and second, because no exception is made in the second or any other clause of this section, I hold that the objection to the indictment is not well taken.

It is urged on behalf of Imsand that the court erred in not admitting evidence of what the accused said or did on a day subsequent to the commission of the alleged offense. While I do not see how this can be taken advantage of on motion in arrest of judgment, yet I have reflected upon the question thus raised, and am satisfied with the ruling. Where an offense against the law is shown to have been committed, the law raises the presumption of guilty intent. To allow this presumption to be overthrown by the declarations of the accused, made subsequent to the commission of the offense, would be to make him a witness in his own behalf, and his unsworn declarations made in his own favor after the offense was committed and completed, to be used to exculpate him. What he said at the time of the transaction may be admitted as part of the *res gestæ*, but I know of no rule of law by which a prisoner can give his own declarations, made at a subsequent time.

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**THE PLANTERS' BANK VS. ST. JOHN.**

1. A citizen of the United States owes his first and highest allegiance to the general government, and not to the state of which he may be a citizen.

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2. A citizen of one of the late insurgent states, who adhered to the cause of the United States and retired within the federal lines, and remained there during the rebellion, continued to be a citizen of the United States, notwithstanding the secession and belligerency of his own state, and notwithstanding his purpose to return to that state after hostilities might cease.
3. A declaration of war or the commencement of actual hostilities between two states *ipso facto* dissolves the partnership relation existing between citizens of the hostile states.
4. Where a partnership consisted of three members, citizens of and doing business in one of the late insurgent states, and soon after the commencement of hostilities, one of the partners removed within the federal lines and adhered to the federal cause, and the other partners remained and assumed to continue the business in the firm name, their acts only bind themselves; the partnership is dissolved by the existence of hostilities between the sections and the relations of the partners as enemies.
5. Under such circumstances an agreement between the partners that the partnership shall continue is against public policy and void.
6. A dissolution of partnership by the fact of war renders express notice of the dissolution unnecessary.

This case was tried by WOODS, Circuit Judge, assisted by a jury.

The facts, as disclosed by the evidence, were substantially as follows: Before the late war of rebellion the plaintiff was an incorporated bank, domiciled at Nashville, Tennessee, and St. John, Powers & Co., was a firm of private bankers doing business in Mobile, Alabama. The firm consisted of Newton St. John, Benj. Whitaker and Wm. G. Chandler, all of whom were resident citizens of Mobile.

On the 29th of May, 1861, on account of the war which had then recently broken out, St. John removed with his family from Mobile, and went to New York city. In June of the same year he procured a passport from the department of state at Washington and went with his family to Europe, returning in the following November. After this he continued to reside in New York until October, 1865, when he returned to Mobile. St. John was opposed to the secession of the state of Alabama, and claimed that he adhered to the cause of the United States. When he went to New York, he left in Mobile valuable real

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estate. During his absence an unsuccessful attempt was made to confiscate his property as an enemy of the Confederate States. There was no formal dissolution of the firm of St. John, Powers & Co. The other partners continued to reside in Mobile and carried on the business in the firm name, and an attempt was made to show that this was with the concurrence of St. John.

In January and February, 1862, the Planters' Bank of Tennessee sent for collection to St. John, Powers & Co., at Mobile, certain accepted drafts on citizens of Mobile, with the understanding assented to by St. John, Powers & Co., that the firm, for a compensation of one-fourth of one per cent., should collect the amounts due on the drafts and remit the same to Nashville if the drafts were paid on presentment, if not so paid, that the drafts should be returned to the Planters' Bank upon demand. The sum due on these drafts amounted to \$46,785. No part of this sum was ever paid by St. John, Powers & Co., to the Planters' Bank, and upon demand made, on March 2, 1866, for the drafts, they failed to deliver them to the bank.

Wm. G. Chandler, one of the firm of St. John, Powers & Co., died in June, 1862.

This action was brought against St. John and Whitaker, as surviving partners, to recover the amounts due on said drafts, with interest. Judgment by default was taken against Whitaker; St. John plead the general issue.

*Messrs. A. R. Manning and Percy Walker*, for plaintiff.

*Messrs. Robert H. Smith and Thomas H. Herndon*, for St. John.

WOODS, Circuit Judge, charged the jury as follows:

The defendant, St. John, pleads the general issue. This puts the plaintiff upon proof of all the material averments of the declaration, and under it the defendant may show either that he did not promise, as alleged in the declaration, or may show any facts impeaching the validity of the promise, and, with some few exceptions, not necessary here to be specified, may

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show any matter of defense which tends to deny his debt or liability.

In order to maintain the issue on his part, the defendant St. John, not controverting the fact that prior and up to the 29th of May, 1861, he was and had been a member of the firm of St. John, Powers & Co., yet, claims that, at the date just mentioned, war having broken out and being then flagrant between the United States and the combination known as the Confederate States, he left the city of Mobile and the state of Alabama—went with his family beyond the military lines of the Confederate States, and within the lines of the United States. That he adhered, during the war, to the cause of the United States, continuing and maintaining his allegiance thereto, recognizing their authority, holding and claiming citizenship in the United States; that he remained beyond the confederate lines and, except for a short interval, within the United States, and within their military lines, until the close of the war in 1865. That his partners, Whitaker and Chandler, remained in and carried on business in the city of Mobile, in the Confederate States, until the death of Chandler in July, 1862; and that, by reason of this state of facts, the partnership of St. John, Powers & Co. was dissolved before any obligation was incurred to the plaintiff; and that therefore, he, not being a partner in the firm at the time of the transactions with the plaintiff in January and February, 1862, is not liable.

“It is a settled rule that when two nations or peoples are at war, all trade with the enemy, unless by permission of the government, is interdicted, and subjects the property engaged in it to confiscation.”

“The war puts every individual of the respective governments, as well as the governments themselves, in a state of hostility with each other. All treaties, contracts and rights of property are suspended. The citizens of the belligerent nations are, in all respects, considered as enemies. They have no power to sue in the courts of the enemy nation. Not only all trading, but all communication and intercourse with the enemy is forbidden.” *The Rapid*, 1 Gall., 295; *S. C.*, 8 Cranch, 155.

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In a state of war, nation is known to nation only by armed exterior, each threatening the other with conquest or annihilation. The individuals who compose the belligerent states exist as to each other in a state of utter occlusion. If they meet, it is only to combat. The universal sense of nations has acknowledged the demoralizing effects which would result from the admission of individual intercourse. Every individual in one nation must acknowledge every individual of the other nation as his own enemy because the enemy of his country. *The Rapid*, 8 Cranch., 155; see also *The Julia*, id., 181. It has even been held that a debtor cannot make remittances to his creditor belonging to a nation at war with his own. *Griswold v. Waddington*, 16 Johns., 488. These rules of law were applicable to the citizens of the United States and of the seceding states during the late war. It is therefore clear that a partnership could not continue between citizens of the United States and the Confederate States during the war. "The intercourse necessary between partners in the conduct of their business is cut off and forbidden by the laws of war, when the partners are citizens of belligerent nations. A state of war creates disabilities, imposes restraints and exacts duties altogether inconsistent with that relation. If one alien enemy could go on and bind his hostile partner by contracts in time of war, when the other can have no agency, consultation or control concerning them, the law would be as unjust as it would be extravagant." *Griswold v. Waddington*, 16 Johns., *supra*. Whatever enriches the citizens of a state increases the power of the state to maintain war. It furnishes property for taxation from which the sinews of war are to be drawn. It is therefore utterly inconsistent with the laws of war that a citizen of one state should have capital employed, and devote his skill, knowledge and effort to a partnership business or adventure with the citizens of a hostile state. Such a connection and such an employment of capital would be giving aid and comfort to the enemy. *Griswold v. Waddington*, 16 Johns., *supra*; see also *Ouachita Cotton*, 6 Wall., 521; *Coppell v. Hall*, 7 id., 542; *McKee v. The United States*, 8 id., 163; *United States v. Lane*, id., 185.

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I therefore instruct you that a declaration of war or the commencement of actual hostilities, which is equivalent thereto, between two nations *ipso facto* dissolves the partnership relation existing between citizens of the hostile states.

You will therefore address yourselves to the inquiry, whether St. John, after the outbreak of the late war and before the transactions set out in the plaintiff's declaration, adhered to the United States, while Whitaker and Chandler adhered to the insurgent states.

It is not disputed that up to the commencement of the war, St. John was a citizen of the United States as well as of the state of Alabama. He owed a paramount allegiance to the United States. To continue a citizen thereof he was not compelled to assume any new relation. It was only necessary for him to maintain the old one towards his government. If after the outbreak of hostilities he removed with his family beyond the military lines of the insurgent states, and put himself within the military lines of the United States; if he went not as an agent of the insurgent states, or in their service; if on arriving within the borders of the states adhering to the government of the United States, he acknowledged his allegiance to that government, by submitting to and obeying its laws, then I instruct you that he continued a citizen of the United States, notwithstanding the state of which he had been a citizen was in armed insurrection against the government of the United States. He continued a citizen of the United States, notwithstanding he may have entertained a purpose at some future day, when hostilities should cease, of returning to the state of Alabama, and notwithstanding he left his property or a portion of it in the insurgent states. And to retain the character of a citizen of the United States it was not necessary for him to settle permanently within the military lines of the United States and without any intention of returning to the insurgent states. If he left the states in rebellion for the purpose of sojourning within the military lines of the United States, and not with any purpose to aid or assist the insurgent states, I charge you that so long as he remained within the

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lines of the United States, adhering to the United States, obeying their laws and acknowledging his allegiance to them, he was a citizen of the United States.

If on the other hand Whitaker and Chandler continued to reside in the insurgent states, whether they engaged in rebellion or not, the simple fact of their residence made them in law enemies of the United States and of every citizen of the United States. *Mrs. Alexander's Cotton*, 2 Wall., 404.

If under these instructions you shall find that St. John continued a citizen of the United States, and Whitaker and Chandler continued to reside within the insurgent states, then St. John was the enemy of Whitaker and Chandler and they were his enemies, and this relation between them put an end to the partnership. Its continuance became illegal against public policy and the laws of war. It was unlawful for them to have any business relation the one party with the other; it was unlawful for them to hold any intercourse; all contracts between them became suspended during the war. In short, a continuous partnership became impossible. The partnership was dissolved by the condition of public affairs and the relation which the partners bore to each other as enemies.

And this would be true even if the parties desired and consented that the partnership should continue. The partnership ceases because it is unlawful, because the laws of war forbid it, because the public safety which is the supreme law forbids it. And therefore, no acknowledgment by one partner or another can make or continue a partnership when the public law says that it cannot and shall not exist. If the law holds all partnerships in war, between citizens of the hostile states unlawful, it is not in the power of the parties to create or continue a partnership in defiance of law. Nothing can be plainer than the proposition that if the parties cannot lawfully form or carry on commercial business together during the war, every agreement for such a purpose would be null and void. *Griswold v. Waddington*, 16 Johns., *supra*.

The public law and public policy forbidding the partnership relation between citizens of hostile states, it is not in the

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power of the partners to continue a partnership during war, by failing to give notice of its dissolution. A dissolution of partnership by the fact of war demands no notice to any person whatever to make it effectual as to all persons whomsoever. If the contrary doctrine were held, enemy partners might continue their partnership relation to a great extent in spite of public law and the public welfare, by a mere failure to give notice of its dissolution. *Griswold v. Waddington*, 16 Johns., *supra*. If then you shall find from the proof and under the instructions I have given you, that St. John continued a citizen of the United States after the outbreak of the war, and his partners Whitaker and Chandler continued to reside within the limits of the insurgent states, then these facts dissolved the partnership which had existed between them without notice, and in spite of any agreement between them, if any such there was, that the relation should continue, and your duty in this case will end so far as St. John is concerned by a verdict in his favor.

But if on the other hand you shall find that the defense set up by St. John is not made out, you will proceed, if the plaintiff has established the averments of the declaration to your satisfaction, to assess the damages.

You will determine in what amount the plaintiff has been damaged by the failure of defendants to pay over the money collected on the drafts, if any was collected, or to return the unpaid drafts on demand. The plaintiff is entitled to the money actually collected, with interest, and to the value of the bills unpaid and not returned, also with interest from the time demand was made for them. You will arrive at the value of the unpaid drafts by estimating from the evidence what amount could have been collected on them at the time they were sent for collection, deducting reasonable costs and charges for collecting. Whatever amount the plaintiff has shown could have been made upon the unreturned drafts, that you will allow as damages, with interest from the time demand was made for the return of the drafts.

Default has been taken against Whitaker. If you find for

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St. John, you will still assess the damages against Whitaker. If you find against St. John, you will assess the damages against both him and Whitaker.

The jury returned a verdict in favor of St. John and assessed the damages against Whitaker at \$65,742.63.

NOTE.—See *Phillips v. Hatch*, 1 Dill., 571; *Montgomery v. The United States*, 15 Wall., 395; *Woods v. Wilder*, 43 N. Y., 164.

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DECEMBER TERM, 1870.

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## OTIS VS. RIO GRANDE.

1. Where no rule is prescribed by the court, the practice of the court as to notice of appeal, and the giving and approval of the appeal bond, makes the rule by which parties must be governed.
2. Where notice of appeal in an admiralty cause is given in open court, immediately upon the rendition of the decree, and written notice thereof filed with the clerk, and the penalty of the appeal bond fixed by the court, and an appeal bond in the penalty as fixed by the court is filed and approved by the clerk before the close of the term at which the decree appealed from is rendered : *Held*, that the appeal was well taken, although neither the term docket nor minutes of the district court recited any of the foregoing facts, or contained any evidence of the appeal.

This cause came on for hearing on the motion of libellant for an order to place the cause upon the docket of this court, the same having been duly appealed from the district court, and bond given as required by law.

*Messrs. Wm. Boyles, E. S. Dargan, and John T. Taylor*, for the motion.

*Mr. George N. Stewart*, contra.

WOODS, Circuit Judge. The motion is resisted on the ground that there is no evidence to be found either on the term docket

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of the district court, or upon its minutes, that an appeal was taken. The want of such entry seems to be admitted. Proctors for libellant state professionally, that on the day the decree was rendered in the district court, they gave notice of appeal, and that the judge allowed it.

The libellant Otis makes affidavit that he was present in court when the judge decided the cause; that he asked for an appeal in a few minutes after the decision was made; that the court granted the same, and at the same time, on request of counsel, the amount of the bond to be given by libellant was fixed by the court, and a bond was given by him, which was accepted by the clerk.

There is among the files, submitted to the court on this motion, the following paper:

"OTIS et al. vs. THE RIO GRANDE — *District Court of the United States for the Southern District of Alabama:*

"SIR — The libellants Otis and other parties, who did work on the Rio Grande, intend to appeal from the final decree of the court in this cause to the circuit court.

"DARGAN & TAYLOR, *Proctors.*"

"To N. W. TRIMBLE, Esq., *Clerk:* On Monday next the libellants will enter into the proper stipulation at the court room.

DARGAN & TAYLOR, *Proctors.*

"May 14, 1868."

This paper was filed in the district court, and bears the file mark of the clerk, of May 14, 1868.

On May 14, 1868, Otis, the libellant, filed his bond with the clerk of the district court, with security in the sum of \$1,000, and the same was approved by the clerk.

This bond recited that an appeal was prayed of the court, and granted.

It further appears that the term of the court at which the decree appealed from was rendered did not close until May 18.

On this showing I cannot doubt that in fact an appeal was taken during the term from the decree of the district court, in this case.

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So that the question is fairly presented, whether an entry on the minutes of the court, showing that an appeal was demanded, is essential to the perfecting of the appeal.

The law regulating appeals to the circuit from the district court, in cases of admiralty and maritime jurisdiction, simply provides that an appeal shall be allowed in all cases when the matter in dispute shall, exclusive of costs, exceed the sum of fifty dollars. No form of notice of appeal is prescribed; no time is limited except that the appeal shall be taken to the next term of the circuit court. The law does not prescribe who shall fix the penalty of the bond, or who shall approve the sureties.

All these matters seem to be left by congress to be prescribed by the rules of the court. This has never been done in the district court of this district, so far as I have been able to learn. The whole matter, as is, or was the case in the district court for the eastern district of Massachusetts, is left to custom and practice.

In the case of *Norton v. Rich*, reported in 8 Mason, 448, the district court, on the hearing, decreed wages to the libellant, and no appeal was taken in court, and the court adjourned without day. Three days afterward, the respondent claimed an appeal in the clerk's office, but the district judge refused to allow it, upon the ground that the party was bound to make his appeal before the final adjournment of the court *sine die*, or within such other period as the court should, upon his application, prescribe. A petition was thereupon addressed to the circuit court in behalf of respondent for relief. On this application Mr. Justice STORY says: "The act of congress has provided no mode as to appeal from the decrees of the district to the circuit courts, confining the appeal only to the next circuit court. In this district," he continues, "no regulations as to appeals have ever been made by the district court. The uniform course from the earliest period has been to make the appeal in open court, *apud acta*, before the adjournment of the court. This course of practice is equivalent to a rule of the court, and must be considered as directory to all parties whenever further time to con-

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sider of an appeal has been asked for, it has been readily acceded to by an adjournment of the court for that purpose."

The effect of this is that when no rule is prescribed, the practice and custom of the court as to notice of appeal, the giving and approval of the bond makes the rule by which the parties must be governed.

In this case, so far as I can learn, the usual practice in the district court has been followed. Notice of appeal was given in open court, and a bond executed in a sum and with sureties approved by the clerk.

But the difficulty recurs that no notice of appeal was entered upon the docket or minutes of the court. Is this necessary?

The law regulating appeals in cases of admiralty and maritime jurisdiction from district to circuit courts, uses precisely the same language as the law regulating appeals from the circuit to the supreme court of the United States. These provisions of law are in the same section of the same statute, namely, sec. 2 of the act of March 8, 1803 (2 Stat., 244). The language in both cases is, "an appeal shall be allowed." In both cases the appeal is allowed as a matter of course. There is no discretion lodged with the court. It is the law and not the court that allows the appeal. So that all that is necessary is that notice of the purpose to appeal be given. A motion which would imply a discretion in the court to grant or overrule would be improper. If the granting of the appeal lay in the discretion of the court, and if a motion made and decided in term time were a necessary step in taking an appeal, then I should hold that the record must show the facts. But when no discretion is lodged with the court, and only notice is required, I am of opinion that it is not necessary that it should be proved by the record.

I have said that the statute uses the same language respecting appeals from the circuit to the supreme court as is used in reference to appeals in admiralty from the district to the circuit court. On a motion to dismiss an appeal from the circuit court for the eastern district of Virginia to the supreme court of the United States, in *Hudgins et al. v. Kemp, Assignee, etc.*,

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18 How., 537, TANEY, Chief Justice, held that it was not necessary to inquire whether the entry made in the order book is to be regarded as a part of the record or merely a memorandum to preserve the history of the case by entering the appeal in the book where it is usually found and would be naturally looked for by the party interested. In either view, this entry was not necessary to give validity to the appeal. In making the appeal the party exercised a legal right. It was made in open court, and the clerk had official knowledge of the fact. And it would have been his duty even if no written memorandum of it had been made to certify it to this court, when the security was approved by the judge and the appeal allowed; and his certificate of the fact is all that is required in the appellate tribunal. He does not certify it as from a copy of the record. The appeal is made orally, and the entry usually made on the minutes or in the order book is to preserve the evidence of the act, and is not necessary to give it validity.

Judge TANEY proceeds: "The act of congress does not require an appeal to be made in open court, or to be in writing, or entered on the minutes of the court, or to be recorded. It is often made before a judge in vacation when it cannot be recorded in the order book as a part of the proceedings of the court. And the law makes no difference as to the form in which it is to be made, whether it be taken in court or out of court before a judge. In either case it may be made orally or in writing."

In the case of *Innerarity v. Byrne*, 5 How., 295, the supreme court of the United States held that "when the record transmitted to this court does not show that a citation had been issued and served, it was no ground for dismissing the case, and that the fact might be proved *aliunde*."

In *Martin v. Hunter*, 1 Wheat., 304, the same court held that it is not necessary that all the steps necessary to give the supreme court jurisdiction should even be on file in the court below, and certainly need not appear to be of record in that court.

In the case in 18 Howard, before referred to, Judge TANEY

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concludes that want of record evidence in the circuit court that an appeal was prayed would be no ground of dismissal, and the certificate of the clerk that it was so prayed is all that is required by the court.

In the case at bar it is established beyond doubt, that in open court an appeal was prayed and allowed, and the amount of the bonds fixed on the very day the decree was rendered. During the same term of the court, written notice was filed of the appeal and is now found among the files of the case, and before the final adjournment of the court for the term, bonds for appeal were given and approved by the clerk and filed.

Under this state of facts and controlled by the decisions of the supreme court of the United States, above cited, I cannot overrule this motion. It is therefore allowed.

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**VAN EPPS VS. WALSH and others.**

1. The obligation of a contract is what the parties intended by it when they entered into it. To ascertain the meaning of a contract, the courts are authorized to consider the circumstances of the parties at the time they made it.
2. A probate judge in the state of Alabama, whose term of office had not expired at the date of the secession of the state, but who held over and served out his term after the state had joined the Confederate States, and the war of secession had commenced, became a judge of the new insurgent government of Alabama, without any new election or appointment.
3. A bond was given in Alabama by the guardian of a minor after the state had seceded and joined the Confederate States, and after the commencement of hostilities between the United States and the Confederate States, conditioned that the guardian should perform all the duties required of him by law: *Held*, that the "law" referred to in the bond was the law of the insurgent government of Alabama, and that a compliance with that law by the guardian discharged the sureties on the bond.
4. When the insurgent government of the state of Alabama undertook, through its officers and laws, to appoint a guardian for the estate of an infant situate within its territory, its act was as valid and lawful as if done by a government *de jure*.

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5. A guardian who receives assets of his ward incurs an obligation even without bond, to improve the estate and account for and pay it over to his ward, with its increase and profits.
6. He can be relieved of this obligation in one of two ways only; either by its full performance, or by discharge therefrom by a court of competent jurisdiction, authorized to act in the premises.
7. The decrees of the courts of a revolutionary and insurgent government, enforcing laws passed in support of rebellion against the lawful government, and intended to defeat the just rights of its citizens, are void.
8. The legislature of the insurgent state of Alabama, having passed December 5, 1861, an act authorizing guardians to invest the estate of their wards in confederate bonds, and A., the guardian of B., having so invested the estate of his ward, and having, on a settlement with the probate court, made during the war, received a credit for the confederate bonds, and at the time of such settlement, his ward being within the federal lines: *Held*, that the settlement was not binding upon the ward, and the guardian was not entitled to credit for the confederate bonds.
9. A decree of the court of chancery of the insurgent government of Alabama, made during the war, affecting the rights of a party who was at the time of the decree in the state of New York, is void.

IN EQUITY. • This cause was submitted for final decree, on the pleadings and evidence.

*Messrs. Robert H. Smith, T. N. McCartney and M. E. McCartney*, for complainants.

*Messrs. John A. Campbell, E. S. Dargan, John T. Taylor, Peter Hamilton and Wm. Boyles*, for defendants.

WOODS, Circuit Judge. On the 16th day of April, 1861, Abram W. Van Epps was appointed by the probate court of Mobile county, Alabama, guardian of Barney H. Van Epps, the complainant, and gave bond in the sum of \$50,000, with E. S. Dargan, Charles Walsh and others as sureties, conditioned that if the said Abram W. Van Epps should well and truly perform all the duties which might be by law required of him as guardian, then the obligation should be void. Under this appointment the guardian reported that he had received as assets of the estate of his ward the sum of \$15,328.89.

On the 10th day of November, 1862, on the application of

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the sureties on the guardian's bond, Abram W. Van Epps, as guardian, filed an additional bond, in the penalty of \$50,000, with E. S. Dargan and Charles Walsh as securities, with the same identical condition as the original bond. On the same day, Van Epps executed a deed of mortgage to Dargan and Walsh on certain real estate in the city of Mobile, in which, after a recital that Dargan and Walsh were sureties on his bond as guardian, the purpose and condition of the mortgage are thus set out: "Now the object of this conveyance is to protect and save harmless my said securities on my said bond, and also to secure the said Barney H. Van Epps in all sums of money I may be found indebted to him on a final settlement of my accounts as such guardian, both of which being done, that is, the full protection of my sureties and the payment of all sums to said Barney H. Van Epps, the minor, this conveyance to be null and void, otherwise to remain in full force." The mortgage further provides, as follows: "If I die before I make a final settlement of my accounts, or, if living, I make such final settlement and am found in arrear and indebted to said Barney H. Van Epps, the minor, then my said sureties or the survivor of them shall have the right to take possession of said premises and hold them for the purposes aforesaid, and to sell the same at public auction, and, from the proceeds, first to pay all the sums I may be indebted to said ward, and the residue to pay over to me or my executors and administrators, if I am not then in life."

On the 8th day of March, 1864, Van Epps resigned his guardianship, and his resignation was accepted by the probate court, and on the same day, Wesley W. McGuire was appointed his successor.

On the 9th day of March, 1864, Van Epps made a final settlement of his accounts, as guardian, with the probate court of Mobile county, from which it appeared that there was a balance of \$15,624.14 as the assets of his ward in his hands. He was directed by the court to pay over to McGuire, his successor, all the assets of his ward, which was done in open court, and the said McGuire acknowledged the receipt thereof. The said

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sum of \$15,624.14 was paid in confederate treasury notes and bonds.

On the 28th day of December, 1868, the complainant having reached full age, cited McGuire, his second guardian, to a final settlement of his accounts. Both parties were present by themselves and counsel, and a settlement was made, and a balance of \$45.56 found in the guardian's hands, which was paid to complainant, and the receipt thereof acknowledged by complainant in open court, and complainant discharged McGuire from further liability to account for the same.

It further appears that, at a partial settlement of the accounts of McGuire with his said ward, made in said probate court, on the 19th of March, 1868, McGuire reported that he had on hand a balance of \$11,758.54 confederate treasury notes, which were declared to be of no value, and for that reason he was allowed a credit for that amount in his account.

The assets received by Abram W. Van Epps of his ward's estate were in gold or its equivalent. The confederate treasury notes and bonds which Van Epps turned over to his successor were, it is claimed, lost to the estate of the ward.

After the final settlement of the accounts of Abram W. Van Epps as guardian, and his discharge by the court on March 9, 1864, Abram W. Van Epps filed a bill in the chancery court of Mobile county against Dargan and Walsh, to compel them to enter satisfaction of said mortgage given to them as aforesaid, which, on the 24th day of February, 1865, the said chancery court decreed to be done, and declared that the mortgage was satisfied and no longer of effect.

In obedience to this decree and on the day of its rendition, Dargan and Walsh entered satisfaction on the margin of the record of said mortgage, in which entry they recite that the satisfaction is entered so far as they have power, and that the same was done in obedience to the decree of court. At the time of the final settlement of the accounts of Van Epps, guardian, by the probate court in March, 1864, and of the decree of the chancery court of Mobile county in February, 1865, Van Epps, the

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ward, was absent from the state of Alabama and was residing in the state of New York.

The object of the bill is to compel Van Epps and his sureties to pay in lawful money the balance found in his hands on March 9, 1864, and which he undertook to discharge by the payment of confederate notes and bonds; that an account may be taken between said Abram W. Van Epps and complainant, and that payment of any balance found due complainant may be enforced out of said mortgaged premises and the said sureties on the bonds of said Abram W. Van Epps.

This claim for relief is based on the allegation that the probate court of Mobile county, which on March 9, 1864 assumed to settle the account of Van Epps as guardian, and to discharge him, and the chancery court which declared said mortgage to be satisfied and directed its release, were not legal courts; that they were without authority to make such settlement, discharge and decree, and that the same are therefore null and void.

Dargan and Walsh, the sureties on both the bonds of Van Epps as guardian, Wesley W. McGuire as administrator of John H. Woodcock, Wm. B. Hayden as guardian of Wm. L. Nunnalee, a lunatic, the said Woodcock and Nunnalee being sureties on the first bond of Van Epps, and Harriet McLane and James McLane, her husband, the said Harriet now claiming to hold the legal title to the premises mortgaged by Van Epps, are the defendants and the only defendants to the bill.

The first question which naturally claims the consideration of the court is, Whether the relief asked by the bill against the sureties on the bonds of Van Epps, the guardian, can be granted?

It is a doctrine so well settled, that the liability of a surety is *strictissimi juris*; that he stands upon the letter of his bond; that his obligation is limited by the terms of his bond, as to require no citation of authorities to support it.

Another rule of law just as well settled is, that the obligation of a contract is what the parties intended it to mean when they entered into it; what they both understood to be the con-

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tract, that is the contract; and to arrive at the understanding of the parties, the courts are authorized to look at the circumstances which surrounded them when they made it.

Keeping these principles in view, let us look at the surroundings of the parties to the bonds of Van Epps. The court knows as historical facts, that on the 11th day of January, 1861, the state of Alabama, represented in convention, passed an ordinance purporting to dissolve its connection with the federal union; that the convention proceeded to organize a state government, which denied and repudiated the authority and laws of the United States, and declared itself to be a state in a government called the Confederate States. It established and put in operation a government for the state of Alabama, which denied and refused all connection with the government of the United States. The officers of the new pretended state government were sworn to support, not the constitution of the United States, but the constitution of a government organized in opposition and in hostility to the United States, called the Confederate States. Before the first of April, 1861, this new government of the state of Alabama had driven out the forces of the United States and seized upon the forts and the arsenal of the United States located within its limits, and held hostile possession thereof. The new authorities of the state, prior to the first of April, 1861, had raised, armed, equipped and drilled troops to resist the power of the United States and to maintain the secession of the state from the federal union. All departments of the government under the new order of things were conducted in subservience to the authority of said Confederate States and recognized the new government of the state.

After the 1st of February, 1861, no officers of the United States exercised or were permitted to exercise any authority as such in the state of Alabama, but were utterly excluded therefrom by the power of the state as so organized, and of the so called Confederate States of America.

Before April, 1861, the Confederate States was fully organized and its government in full operation in and over Alabama

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and other seceding states, and its seat of government was established in Alabama, with a president and congress, cabinet and judiciary elected or appointed according to its constitution.

On the 13th of April, 1861, the Confederate States commenced hostilities against the United States, and on the 15th of April, 1861, war was recognized by the president of the United States as commenced and existing between the United States and Confederate States of which Alabama was one. On the 16th day of April, 1861, not a vestige of the authority of the United States or of the government of the state of Alabama as a member of the federal union remained in the state. On that day a judge of the Confederate States was holding office in Mobile, the courts of the states were organized under the authority of the new state government, or acknowledged that authority and stood ready to submit to and enforce its laws. The great mass of the people of the state believed that the dissolution of bonds between Alabama and the federal union would be perpetual, and that thenceforth, the state would remain a member of the Confederate States, which was to hold the relation to the United States of enemies in war, in peace, friends.

In this condition of affairs the contract of these sureties was made. The obligee of the bond was John H. Hitchcock, probate judge of Mobile county. He had been elected under the old government of Alabama, and his six years' term was about to expire. He held over after the secession of the state, and served out his term. It cannot be successfully maintained that he was not a judge under the new insurgent government of Alabama. The assumption that he was not leads to consequences so absurd as to make it untenable.

What then was the contract of these sureties, as understood by themselves and John H. Hitchcock, the acting probate judge. They agreed that their principal should, as guardian, well and truly perform all the duties which were or might be required of him by law. By what law? Not the law of the displaced government of Alabama, for that had in the contemplation of the parties no force. Nor by the law of the

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United States, for that was repudiated and could not at the time be enforced in the state. The conclusion is irresistible that their contract was based on and referred to the existing order of things and that the law by which the guardian was to be governed was the then existing law, and such other laws as should be put in force during the continuance of the trust. To suppose that they had any other law in view is too unreasonable a proposition to be for a moment entertained. If Alabama and the other Confederate States had succeeded in achieving permanent secession and independence, can there be a doubt that no question would ever have been raised as to what was meant by this contract? The settlement of the guardian in 1864, would never have been challenged, and it would not have been challenged because it would strike the universal sense that the settlement was binding and valid, and the covenants of the sureties performed. Can it be plausibly argued that because the rebellion and secession proved in 1865 to be a failure, therefore the contract of these sureties made in 1861 and 1862, and which had been fully performed and discharged in 1864 as the parties understood it, was changed, and a different liability raised thereon? We are bound, if the language of the obligation permits, to give such effect to it as the parties, when they made it, intended to give. It is no answer to this, to say that the judge who settled the account of Van Epps in 1864, and discharged him, was not a legal officer. These sureties never agreed that the account should be settled by a lawful probate judge, as that term is now understood. They agreed that the account should be settled under what they understood at the time to be the laws of the state, and by the person who under those laws was performing the duties of probate judge, and whose authority was derived from those laws. These were the laws and these the officers, that without controversy, must have been in their contemplation when the bond was executed.

Suppose that the condition of the bond had been that the guardian should settle his trust to the approval and satisfaction of the chamber of commerce of the city of Mobile, and that

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such settlement had been made, and the condition of the bond according to its terms complied with. These sureties would not be liable on the bond, because the chamber of commerce was not a court, and had no jurisdiction over the subject matter of the settlement, for they had fulfilled precisely what they agreed to do. In either of the cases supposed, namely, the success of the rebellion after the settlement of the guardian with the acting probate judge, or the giving of the bond that the guardian should account with the chamber of commerce, the conditions of the bond being performed according to the intention of the parties, no suit at law could be maintained on the bond. The plea of covenants performed would be a complete bar to such action.

But secession failed ; the insurgent government of Alabama, more than a year after the final settlement of the guardian's accounts with his ward had been made by the acting probate judge, in accordance with the laws the parties to the bond had in view, was overthrown, and the old government restored. It is now sought by this bill to make a new contract for these sureties ; a contract which in all probability never entered their minds when they became sureties, to wit, that having discharged their contract according to the laws in their contemplation when they made it, they are to stand bound until their principal accounts according to the laws of the restored governments, state and national.

They stand upon the terms of their bond as contemplated at the time by all parties ; they have the right to say that their contract shall not be extended the division of a hair ; they say they have performed their covenant according to its true interpretation, and that no action can be maintained upon it, and we think the position is impregnable.

There is no equity against a surety. If at law he is released, he is released altogether.

When a court has no power to appoint a guardian, but does appoint him, and he gives bond with sureties, and takes possession of the estate of his ward, it is not competent for any of the obligors in such bond to object to its validity on the ground

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of want of power in the court to make the appointment. *Iredell v. Barbee*, 9 Iredell, 250.

While we recognize this doctrine, and hold the sureties concluded by a bond taken by a court not authorized to take it, still we can not enlarge the liabilities of the bond, change its terms, or extend its meaning beyond the fair intendment of the parties.

In *Texas v. White*, 7 Wall., 733, the supreme court uses this language: "It is a historical fact that the government of Texas then in full control of the state, was its only actual government, and certainly if Texas had been a separate state, and not one of the United States, the new government having displaced the regular authority, and having established itself in the customary seats of power and in the exercise of the ordinary functions of administration, would have constituted in the strictest sense of the words a *de facto* government, and its acts during the period of its existence as such would be effectual and in almost all respects valid. And to some extent this is true of the actual government of Texas, though unlawful and revolutionary as to the United States. It is not necessary to attempt any exact definitions within which the acts of such a state government must be treated as valid or invalid. It may be said perhaps with sufficient accuracy that acts necessary to peace and good order among citizens, such for example as acts sanctioning and protecting marriage and the domestic relations governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts which would be valid when proceeding from a lawful government, must be regarded in general as valid, though proceeding from an actual though unlawful government; and that acts in furtherance and support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must in general be regarded as invalid and void."

When, therefore, the actual existing government of Alabama, on the 16th of April, 1861, undertook, by its officers, to appoint a guardian for the estate of an infant situate within its

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territory, it was doing as *parens patriæ*, an act as valid and lawful as if done by a government *de jure*, and *pro hac vice*, was in effect a lawful government. Neither it nor its officers can be called to account for discharging a lawful duty. If the state as *parens patriæ* undertakes the duty of caring for an infant's estate, it alone can be allowed to prescribe how that trust shall be discharged, and can be called to account by no other power or person so long as its acts are not in furtherance and support of rebellion against the rightful government, or intended to defeat the just rights of citizens.

On this branch of the case, therefore, I am of opinion that a probate judge of the insurgent government of Alabama might lawfully appoint a guardian for an infant's estate within its territory, and take bond for the faithful discharge of the trust by the guardian; that the bond is valid, and that, to this extent, the acts of such officer or the government under which he acts cannot be called in question. Further, that such bond must be construed, so far as sureties are concerned, according to the laws of the revolutionary government, and according to the understanding of both obligors and obligees at time of its execution.

The result of these views is, that the bonds of Van Epps, as guardian, are valid; that the guardian, having performed his duty according to the laws of the government in force when the bond was executed and the settlement of the guardian made, and as the parties to the bond understood he was to do, the sureties have performed their covenant and are discharged from further liability, and, as to them, the bill must be dismissed. Let it be understood, however, that the sureties are relieved solely upon the ground that they have performed their contract as they understood it, and as the state, as *parens patriæ*, acting by its officer, understood it at the time it was made.

But, while the sureties on the bond are discharged, it does not follow that the guardian is clear of liability. By the reception of the property of his ward, he incurred liabilities independent of any bond, and which would attach to him with-

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out bond, and which attach to him independent of his relationship as guardian. This obligation was to improve the estate of his ward and to account for and pay it over to his ward with its increase and profits. He can be relieved from this obligation in one only of two ways, namely, by the full performance of the obligation, or by his discharge therefrom by a court of competent jurisdiction authorized to act in the premises, and whose findings and decrees are valid. When the guardian relies upon the decree of the court of a revolutionary and insurgent government for his discharge, it must appear that its proceedings were not in support of the rebellion against the lawful government, or intended to defeat the just rights of citizens. The act of the revolutionary legislature of Alabama, passed December 5, 1861, authorizing guardians and other trustees to purchase bonds of the Confederate States, or of the state of Alabama, or to receive their notes in payment of any debts due the ward, was an act in furtherance of the rebellion, and therefore void; it gave no authority to guardians to purchase such bonds, and the decree of any probate court allowing a guardian a credit for such notes or bonds, was of effect to defeat the just rights of a citizen, to wit, the ward, and was of no binding force on him, and did not operate to discharge the guardian. The court, in attempting to make such a settlement, was no court, and its decree no decree.

The decree of the chancery court of Mobile county, directing Dargan and Walsh to enter satisfaction of the mortgage made to them by Van Epps, the guardian, was also made *coram non judice*. The main party in interest was the minor Van Epps, who was in the state of New York, and prohibited by the laws of the United States from making any defense. It is not pretended that any actual notice was served, or could be legally served upon him, and, even if served, he could make no defense, and the purpose of the decree against him was to deprive him of the security which his guardian had given him to protect his estate. It was a decree depriving him of his just rights, and, in rendering it, the court was no court, and the decree ineffectual. *Cuyler v. Ferrill et al.*, 8 Am. Law Reg., N.

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S., 100; *Buchanan v. Rucher*, 9 East, 191; *Borden v. Fitch*, 15 Johns., 121; *Newdigate v. Davy*, 1 Ld. Raymond, 742.

We have therefore arrived at these further conclusions, that the payment in confederate notes and bonds, of the balance found due by the probate court of Mobile county from Van Epps as guardian, was not binding on his ward, the complainant, nor was the decree of the chancery court of Mobile county, directing the release of the mortgage given by Van Epps, binding on the ward, so that the ward has a just claim against his guardian for so much of his estate as was converted into confederate notes and bonds, and paid over to McGuire, the second guardian.

It has been repeatedly held by the supreme court of Alabama, that all judgments rendered by the revolutionary state courts of Alabama are void. *Ex parte Bibb*, 44 Ala., 140; *Noble & Bro. v. Cullum & Co.*, id., 554. And in the case of *Bibb*, the court held that the ordinance of the convention, No. 26, of 1865, dated September 12, 1865, purporting to ratify such judgments, was illegal and void. While unwilling to accept this doctrine in the broad terms laid down by the supreme court of this state, yet I am of opinion, as already expressed, that where the judgments of the courts gave effect to the legislation of the revolutionary legislatures, which was enacted for the purpose of aiding the rebellion or deprived citizens of the United States of their just rights, such judgments and decrees are void, and no subsequent legislation can make them good. The settlement of the probate court in 1864, being void as well as the decree of the chancery court, no direct proceeding is necessary to set them aside or reverse them. They are nullities so far they undertake to conclude the rights of complainant against his guardian, and a bill in equity in this court is a proper method for enforcing these rights.

The complainant having then a just claim on Van Epps, his guardian, and the release of the mortgage given by him to Dargan and Walsh being void, it remains to consider what, if any, are the rights of complainant under that mortgage.

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The settlement made by Van Epps, the guardian, with the probate court on March 9, 1864, shows that he had in his hands, of his ward's money, \$15,724.14. That is the balance, as struck by the probate judge. The payment of this sum or any part of it in confederate notes or bonds was no payment. Per WALKER, C. J., in *Shackleford v. Cunningham*, 41 Ala., 205. Now, what is the purpose of the mortgage given by Van Epps to Dargan and Walsh, as expressed in the instrument itself? It is not only to indemnify them, as his sureties, but to secure Barney H. Van Epps in all sums of money he, the guardian, might be found indebted to him on a final settlement of his accounts as guardian, and the mortgage provided, that if the mortgagor died, before final settlement, or if living, made such settlement, and was found indebted, and in arrear to his ward, the mortgagees might sell the mortgaged property and pay such indebtedness. This makes Dargan and Walsh trustees for the benefit of the minor, and as such trustees, they have a mortgage lien for the benefit of complainant on the premises, to secure him in the amount due from his guardian.

If the views we have expressed are correct, McLean and wife cannot be innocent purchasers of the mortgaged property, for the mortgage remains of record without any valid release, and that is constructive notice to them.

Before, however, any decree could be made by this court, by which the lien of the complainant could be enforced on the mortgaged premises, Abram W. Van Epps must necessarily be made a party. No such decree could be made which would not directly affect him. Being a nonresident he cannot be made a party. By reason of this deficiency in the jurisdiction of this court, I am unable to see how any relief can be given complainant as against Abram W. Van Epps and the mortgaged property.

The bill must, therefore, be dismissed as to Dargan and Walsh and the other sureties on the bonds of Van Epps, and as to McLean and wife and Dargan and Walsh, as trustees under the mortgage, the bill is dismissed without prejudice.

Decree accordingly.

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APRIL TERM, 1871.

## ST. JOHN VS. THE EXPRESS COMPANY.

1. The reception by an express company of a package for transportation to a point beyond its route, and the receipt of the entire compensation for the transportation to that point, is sufficient to make out a *prima facie* case of contract to carry and deliver the package to that point.
2. To avoid liability in such case, the company must show a specific contract to carry only to its own terminus, or a settled and uniform rule not to assume liability beyond that point, which rule must be brought home to the consignor, either by express notice, or by a notoriety so general that he may be fairly presumed to have had notice.
3. Plaintiff delivered a package addressed to a consignee in New York, to defendant, an express company in Mobile, paid the freight for the entire distance and took a receipt, stating that "this company is to forward the same to its agent, nearest or most convenient to destination only, and then to deliver the same to other parties, they to complete the transportation; such delivery to terminate all liability of the company for such package. The company's route extended only to Lynchburg, but it had an arrangement with the Adams Express Company to transport such packages to any point on the latter's route, and receive a *pro rata* share of the freight: *Held*, that the Adams Express Company was the agent of defendant, within the terms of the receipt, and defendant was liable for failure to deliver in New York.
4. If an express company has a settled and uniform rule that money packages must be sealed and indorsed in a certain way, and such rule is brought home to the knowledge of the consignor, who neglects or intentionally omits to comply with it, and the company in ignorance of the special value of the package, takes ordinary care of it only, the company will not be liable for the loss.
5. If, however, the money is stolen by an agent of the company, and the company recovers the money from the thief, it will be liable for the amount so recovered, upon a count for money had and received, notwithstanding the violation of its rules by the consignor.

This case was tried by WOODS, Circuit Judge, and a jury. The evidence tended to prove this state of facts:

After the close of the late war of the rebellion, the postal service between the northern and southern states was considered unreliable, and the defendant, the Southern Express Com-

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pany, having an office in Mobile, was largely employed in the conveyance of letters. These were required to be put up in stamped postal envelops, and the uniform charge on all letters, not containing money, for their conveyance for all distances within the United States was twenty-five cents. When the superscription did not indicate that the letter contained money, it was sent, on reaching its destination, to the post office for delivery. But when the superscription indicated that the letter contained money, it was delivered to the person to whom addressed and his receipt taken. The charge for the transmission of a money letter was four dollars per thousand dollars inclosed, and the rules of the company required the amount inclosed to be stated on the envelop, and that the envelop should be sealed in a prescribed way.

The defendant's route extended only to Lynchburg, but it had an arrangement with Adams Express Company to transport packages to any point on the latter's route, and receive a *pro rata* share of the freight, and it was the practice of the defendant company to deliver to the Adams company at Lynchburg, packages under this agreement.

An attempt was made to bring home to the plaintiff a knowledge of these rules and practices of the company, and on the part of the plaintiff to show that the rules of the company had been relaxed in his favor by the agent of the company at Mobile.

On the 26th of May, 1866, the plaintiff inclosed six bank bills for one thousand dollars each, in an ordinary stamped postal envelop, and having indorsed upon it the word "important," addressed it to J. B. Alexander & Co., New York City; he delivered the same to the agent of the defendant at Mobile, for transmission, according to the direction; paid twenty-five cents therefor, and took a receipt stating that "this company is to forward the same to its agent nearest or most convenient to destination only, and then to deliver the same to other parties, they to complete the transportation, such delivery to terminate all liability of this company for such packages."

There was no indorsement upon the envelop and nothing

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in the manner in which it was sealed to indicate that the package contained money.

On the 3d of June following, the plaintiff, under precisely the same circumstances, delivered another package to defendant for transmission to New York, also addressed to J. B. Alexander & Co., and containing five thousand dollars.

These two packages safely reached the office of the Adams Express Company in New York, and appearing to be ordinary letters of no intrinsic value, were handed to the messenger usually employed for that purpose to deposit in the New York post office for delivery. The packages were stolen by the messenger and neither of them nor their contents ever were delivered to Alexander & Co., or the plaintiff.

There was some evidence tending to show that the Adams Express Company had recovered a part of the money contained in the packages from the messenger who stole it.

*Messrs. Robert H. Smith and Thos. H. Herndon, for plaintiff.*

*Messrs. Wm. G. Jones and John P. Southworth, for defendant.*

WOODS, Circuit Judge, charged the jury as follows:

The plaintiff claims that the defendant, being a common carrier on the 26th day of May, 1866, undertook and agreed with plaintiff for a valuable consideration, to transport from Mobile, Alabama, and to deliver to J. B. Alexander & Co., in the city of New York, a sealed package, which the plaintiff on that day delivered to the agent of defendant in Mobile, containing six thousand dollars, the property of the plaintiff. That by and through the negligence and carelessness and improper conduct of the defendant and its servants, said package and its contents were wholly lost to the plaintiff.

Plaintiff further avers that on the 3d day of June, 1866, the defendant, as such common carrier, undertook and agreed with plaintiff for a valuable consideration to transport from Mobile, Alabama, and to deliver to J. B. Alexander & Co., in New York city, another sealed package which the plaintiff on that day delivered to the agents of defendants in Mobile, containing five thousand dollars, the property of the plaintiff, and that

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by the negligence, carelessness and improper conduct of the defendant and its servants, said last named package and its contents were also wholly lost to the plaintiff. He therefore seeks to recover of the defendant the amount of money contained in said packages, with interest. He has also included in his declaration counts for money had and received, and upon an account stated. The defendant pleads the general issue, with leave to give in evidence any matter that might be specially pleaded.

This action is brought against the defendant as a common carrier. The undertaking of a common carrier is to deliver the goods entrusted to him against all events, unless prevented by the act of God, or the public enemy, except where his liability is limited by contract.

Before the plaintiff can recover, he must establish his case by proof substantially as he has stated it. Your first inquiry will therefore be, Did the plaintiff deliver the packages containing money, or either of them, to the defendant, to be carried to New York and delivered as alleged, and did the defendant, for a valuable consideration, undertake and agree to convey them to New York city and deliver them to J. B. Alexander & Co., as the plaintiff avers, and has the defendant failed so to deliver them? On the question of the delivery of the packages to the agent of the defendant in Mobile, and the failure of the defendant to deliver them to J. B. Alexander & Co., in New York, I presume you will have little trouble. I do not understand the defendant to controvert these facts. They must be proven, however, to your satisfaction. But the defendant alleges that its lines of business reach only as far north as Lynchburg, Virginia, on the route to New York city; that this fact was known to plaintiff, and that its agreement was not to convey the packages to New York, but to convey them to Lynchburg, Virginia, and then safely to deliver them to Adams Express Company; that it did so transport and safely deliver the packages, and that it is therefore not liable to plaintiff for any loss which occurred after such delivery to the Adams Express Company.

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You are to decide from the facts in the case, and controlled by the rules of law as I shall give them to you, what the contract of the defendant with the plaintiff was.

I instruct you that the reception by an express company of a package for transportation, directed to a point beyond the route of the express company, and the receipt by such company of the entire compensation for the transmission and delivery of the package to the point to which it is directed, makes out a *prima facie* case of a contract to carry and deliver the package according to the superscription, and will bind the company unless a different contract is shown, or a settled and uniform rule established by the company not to be bound beyond its own line, which rule is brought home to the consignor, either by express notice or by a notoriety so general that he may fairly be presumed to have had notice.

If you find the fact to be that the defendant received the packages of the plaintiff directed to J. B. Alexander & Co., New York, for transmission, and received the pay for the entire route from Mobile to New York, then I instruct that *prima facie*, the plaintiff has shown a contract on the part of defendant to carry the packages to New York and deliver them according to the direction, and that the Adams Express Company and its servants were the agents of defendant to complete said transmission and delivery. This proof would, however, only make a *prima facie* case, and the defendant may rebut it by other proof.

It was competent for the defendant to contract that it was to be bound for the safe transmission of the packages over its own lines only, and if it has satisfied you by proof that it did so contract, then it cannot be held liable for the default of the Adams or any other company which undertook to complete the conveyance of the packages.

I believe it is not claimed that defendant made any such contract expressly with the plaintiff, but it is insisted that such contract may be fairly implied from the form of receipt given by the defendant for money packages, and that such receipts must, from their general use by the company, have been familiar

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to the plaintiff. The defendant says that its receipts for money packages contained a provision in these words: "That this company is to forward the same to its agent nearest or most convenient to destination only, and then to deliver the same to other parties, they to complete the transportation, such delivery to terminate all liability of this company for such packages."

You will first determine from the proof whether the contents of this receipt were brought home to the knowledge of plaintiff. If you find they were, then I say to you that the true construction of this provision is that the defendant undertakes to deliver packages at any point upon its own routes, or upon the routes of any other company with which it has an arrangement to receive, convey and deliver packages, for a *pro rata* share of the compensation paid by the shipper; but when the terminus of its own route or the route of such a connecting company is reached, and the package is to go to a point beyond, then the defendant is only bound to deliver the same to other parties to complete the transportation, and on such delivery, its liability ceases.

I instruct you, that if you find from the proof that there was an understanding between the defendant and the Adams Express Company by which the latter agreed to receive from the former at the end of its route all packages for transmission over the routes of the Adams Express Company, and to deliver them according to the superscription at any point on the routes of the Adams Express Company, and received a *pro rata* share of the money paid the defendant for the transportation of the package, then the Adams Express Company was the agent of the defendant, referred to in the language of the receipt, and if the Adams Express Company had an agency or office in New York, it would have been the duty of this defendant under that receipt to carry the package to New York, either by itself, or its agent the Adams Express Company, and then deliver it according to its superscription. You are not, however, to confine your consideration upon this point to the terms of this receipt exclusively. You may examine the way bills and other blank forms of the defendant to ascertain what its contract was, and you may take into consideration any statements you

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may find to have been made to plaintiff by the superintendent or other agent of the defendant, in reference to the transmission of these or other packages, or any special contract or understanding made by defendant's agent with plaintiff.

If you shall find under these instructions that the defendant only contracted to carry the packages of the plaintiff over its own routes, and then to deliver them to another company for transmission to its destination, and that it has performed this contract, then that is an end of the case against the defendant, so far as its liability as a common carrier is concerned. If, however, you find that the defendant undertook to convey the packages to New York, and then deliver them to the persons to whom they were addressed, you will then proceed to consider another branch of the defense. This is, that the rule of the defendant was that packages containing money should be sealed in a certain way; that the amount of the contents should be indorsed upon the package, and a certain rate of compensation for carriage, in proportion to the amount of money conveyed, should be paid; that the plaintiff, well knowing this rule, placed the money which he alleges was lost in an envelop not sealed according to the rules, nor containing a statement indorsed upon the envelop of the amount of the contents, and that he only paid the rate charged by the defendant for the transmission of an ordinary letter containing no inclosure of value, and that by reason of this default on the part of the plaintiff, the packages were entrusted to an agent of the Adams Express Company in New York, who was only employed to deliver ordinary letters, and not valuable packages, and were thereby lost.

Upon this branch of the defense, I instruct you, that the rules of the company, in order to have any influence upon the decision of the case, must have been known to the plaintiff, and these rules must have been settled and uniform. If these rules were not by the proof brought home to the notice of the plaintiff, or if the defendant was in the habit of departing from them, and allowing exceptions to be made to them, and these facts were known to plaintiff, or if there was any understanding

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or agreement between the plaintiff and the agent or superintendent, that the rule was not to be enforced against the plaintiff, in either of these cases, the existence of the rules can have no effect upon the decision of this case. In short, the rule must be settled, uniform and known to plaintiff. If you find they were thus settled, uniform and known to the plaintiff, and no exception was made by the agent of defendant in his favor, exonerating him from a compliance therewith, and you find that the contents and value of the packages sent by plaintiff were improperly concealed by him from the defendant for the purpose of depriving him of a part of the compensation the defendant would otherwise have claimed for the transportation and risk, the defendant would not be liable if using the ordinary vigilance which a prudent man would exercise over his own property of the same apparent value.

I instruct you further, that if by reason of the failure of the plaintiff to comply with the rules of the defendant, known to him, the defendant was ignorant of the value of the package, and in consequence thereof, was induced to entrust the package to a messenger who was employed only to deliver packages of no intrinsic value, and failed to place it in the hands of its messenger known to be honest and trustworthy, who was uniformly employed to deliver valuable packages, and by the dishonesty of the messenger to whom the package was entrusted, it was lost; in that case the defendant would not be liable.

If you should find for the defendant upon these issues, it would, nevertheless, be your duty to consider that branch of the plaintiff's case which arises upon what are called the common counts. Under them the plaintiff claims that the Adams Express Company is the agent of the defendant; that the Adams Company, as such agent, has not lost the money of plaintiff, or all of it, but has it or a large part of it in its possession, or has converted it to its own use.

If you find under the instructions already given you, that the Adams Express Company is the agent of the defendant, and that it has retained the money of the plaintiff in its pos-

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session, or has recovered it from any person who stole it, then you should find a verdict for the plaintiff for the amount which you may decide has come to the possession of the Adams Express Company and is retained by it, or has been converted by it to its own use, with interest from the date of demand, if you shall find a demand has been made; if not, from the commencement of this suit. For, although the plaintiff may have knowingly violated the rules of the defendant in the manner of transmitting this money, still that does not divest the plaintiff of his property in the money, nor authorize the defendant, either by itself or agent, to confiscate it. The defendant is bound to pay it over on demand with interest from the date of demand.

The jury returned a verdict for defendant.

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**BUTTNER VS. MILLER.**

An action on the case, begun in a state court, to recover damages for alleged slanderous words spoken by a United States collector of customs, while in the discharge of his official duty and explanatory of it, can be properly removed to the United States circuit court under the provisions of the "force act," approved March 2, 1833.

**HEARD UPON MOTION.**

*Mr. George N. Stewart*, for plaintiff.

*Mr. John P. Southworth*, for defendant.

WOODS, Circuit Judge. This cause was transferred upon the petition of defendant into this court from the circuit court of Mobile county, Alabama, by virtue of the provisions of the 3d section of the act of March 2, 1833. (4 Stat., 633.)

The case is now heard upon the motion of plaintiff to quash the writ of *certiorari*, by which the record was removed to this court from the state court, and that the cause be remanded to

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the state court. The grounds of this motion are: That the cause was wrongfully transferred to this court, and this court has no jurisdiction thereof.

The petition filed by defendant for the removal of the cause to this court states, in substance, that on the 20th day of September, 1869, he was and ever since has been the United States collector of customs in and for the district of Mobile; that on the day and year aforesaid, as such collector, he caused to be seized for a violation of the revenue laws of the United States, certain casks of brandy and cases of claret wine.

That on the 8th day of October, 1869, the plaintiff who, together with his partner, was the importer of said goods, commenced a suit against the defendant in the circuit court of Mobile county, to recover the sum of three thousand dollars damages, alleged to have been sustained by him by reason of the defendant having, as plaintiff alleged, falsely and maliciously charged him, the plaintiff, with importing and receiving said goods in fraud of the revenue laws of the United States, and with aiding in so doing without the payment of the duties of importation, and that said suit was then pending and undetermined in the said circuit court of Mobile county.

That said alleged grievances occurred while the defendant was in the discharge of his official duty as collector aforesaid, and in connection with the seizure of said goods by him as such collector for the alleged violation of the revenue laws of the United States.

The motion to remand the case admits the facts set out in this petition for removal, and proceeds upon the ground that under this state of facts the case was improperly removed, and this court is without jurisdiction over it.

The law under which the removal of the case to this court was made provides, "that in any case where suit or prosecution shall be commenced in a court of any state against any officer of the United States, for or on account of any act done under the revenue laws of the United States or under color thereof, \* \* \* it shall be lawful for the defendant in such suit or prosecution at any time before trial upon petition to the circuit

court of the United States for the district in which the defendant shall have been served with process," to cause said suit or prosecution to be removed into said circuit court, and the same "shall be thereafter proceeded in as a cause originally commenced in said court." (4 Stat., 683, sec. 3.)

This provision of the statute is found in what is commonly known as the Force Act, approved March 2, 1833, and so far as it applies to officers of the United States engaged in the collection of duties on imports, is unaffected by subsequent legislation. *Hornthall v. The Collector*, 9 Wallace, 560.

It appears from the petition for the removal of the cause, that the words spoken by defendant, which are the ground of complaint, were spoken by the defendant while in the discharge of his official duties as collector of customs, and in connection with the seizure of goods for alleged violation of the revenue law.

Can these words be considered under the statute as an act done under the revenue laws of the United States? We think they may. In this case they appear to have been spoken in connection with the act of seizure, and in explanation or justification thereof. They therefore become a part of the act, and together with the seizure, form one transaction.

The opposite view would lead to this absurd consequence. The collector could remove from the state courts an action of trespass against him for unlawfully seizing goods under the revenue law, but could not remove an action for slander, based on his verbal order to his subordinate to seize the goods, giving as a reason that they were smuggled, or that the consignees were fraudulently evading the payment of duties. Or, suppose the collector is in the act of seizing goods for alleged violation of the revenue law. The owner or consignee demands to know of him the reason for the seizure, and he replies, "because the goods are smuggled; because you are attempting to cheat the government out of the duties;" could it be fairly claimed that an action against the collector for the seizure could be removed from the state court, while an action for the words spoken could not? The words spoken by the collector, either in giving his reasons for an order to seize goods, or in explana-

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tion of a seizure, are a part of the transaction, and we think can fairly be said to be an act done under the revenue laws of the United States.

It is said, however, that the revenue laws do not authorize malicious slander. Neither do they authorize the wrongful seizure of goods, nor the commission of any offense. Yet in both these cases a suit or prosecution for an act done under the revenue laws, or under color thereof, may be removed to the federal court. Such removal is expressly authorized by the statute.

We are of opinion, therefore, that under the facts set out in the petition for the removal of this case, the case was properly transferred to this court, and that this court has jurisdiction thereof.

Motion overruled.

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**ESLAVA VS. MAZANGE'S ADMINISTRATOR and others.**

1. Under the statutes of the United States in actions against executors, administrators or guardians, "neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court." An *ex parte* order, obtained by complainant before process issued for his own examination as a witness, does not qualify him as such on the ground that he is required by the court to testify.
2. The reservation of power in the court to require the evidence to be taken was made in order to provide for such extreme and special cases as might arise, in which it would be a great hardship not to take it.
3. Where a bill was filed to set up a parol trust in real estate against the heirs and administrators of a deceased person, and an execution creditor of the complainant who had levied on the property was made a defendant, and had filed a cross bill, such execution creditor could be considered as "the opposite party," referred to in the act of congress, who is authorized to call the complainant as a witness. The "opposite party" is that party against whom the evidence is sought to be used.

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4. In such a case the evidence of the party cannot be taken and admitted under the 70th equity rule, on the ground that the witnesses are old and infirm. This rule was not originally intended for the examination of a party, and it is doubtful whether it ought ever to be extended to the case of a party propounding himself as a witness.
5. In equity, orders obtained upon motion may be discharged upon motion, and orders obtained *ex parte* may be thus discharged when they have never been assented to by the other party.
6. A motion to suppress depositions fairly brings up the regularity of an order directing them to be taken, as well as the competency of the witnesses examined, if the party moving to suppress has never waived the objection.

This was a cause in equity which came on for hearing upon the motion of defendant to suppress the depositions of complainant and his wife.

*Mr. Alex. McKinstry*, for complainant.

*Messrs. Geo. N. Stewart, J. Little Smith, A. R. Manning and Percy Walker*, for defendants.

BRADLEY, Circuit Justice. The bill is filed in this case to subject certain property, conveyed by the complainant to Ovid Mazange many years since, to a parol trust, in favor of the complainant, on which, as he alleges, the conveyance was made. The Bank of Mobile is made a defendant because it has an execution against Eslava which has been levied on the property in question.

On filing the bill and before issuing the subpoena, the complainant obtained an order to examine himself and his wife as to any transactions with or statements by Ovid Mazange, deceased, upon interrogatories to be served on the parties to the suit, or upon notice to them, before some commissioner of the United States. The rule suggests that Eslava and his wife are aged and infirm, and reside in New Orleans.

As soon as issue was joined in the cause, the defendants gave notice to the complainant that they desired the testimony in the case should be taken orally, under the 67th rule of the court, and soon after filed written objections to taking the testimony of the plaintiff and his wife on the grounds, amongst others,

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that the complainant was not a competent witness in the case (Mazange being dead), and that the wife could not be a witness for her husband. The complainant's counsel, nevertheless, after this, proceeded to file and serve interrogatories with a view to examine the complainant and his wife on commission. The defendants filed cross interrogatories under protest. The examination having been taken and the depositions returned, the defendants at the last term moved to suppress the same. The motion, not being disposed of, is now repeated. One ground of the motion is, that the complainant and his wife are not competent witnesses in the case.

In general the competency of witnesses in the United States courts in civil cases is governed by the law of the state in which the court is held. Such was the rule enacted by the statute of July 6th, 1862 (12 Stat., 588). But congress has specially regulated the subject now before the court. By the act of July 2, 1864 (13 Stat., 351), it was declared, amongst other things, that there should be no exclusion of any witness in the federal courts because he was a party to, or interested in, the issue tried. This act was modified by that of March 3, 1865 (13 Stat., 533), by which it was enacted that in actions by or against executors, administrators, or guardians, neither party should be allowed to testify against the other as to any transaction with, or statement by, the testator, intestate or ward unless called to testify thereto by the opposite party, or required to testify thereto by the court. This act is a recognition of the glaring injustice it would involve, to permit one party to propound himself as a witness in his own behalf as to a transaction between him and a deceased person, who can no longer give his version of the affair. If the law were to allow a man to wait until his antagonist were dead, and then to sue his heirs, and put himself upon the witness stand and give his version of the affair, with no one to contradict or qualify his testimony, it would be as gross a prostitution of the forms of law, as to allow a man to be *judge* in his own cause.

Every honest mind revolts against it. There may be special cases, it is true, in which the court can see that no injustice

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would be done by calling on a party to testify, even though his adversary be deceased. But it is useless to attempt to anticipate such cases. When they arise it will be for the court, and not the party himself, to suggest that he be called. Or, if he make the suggestion, the other party ought at least to be heard upon it.

It is claimed in this case that the court has made an order to take the testimony. But how was it made? It was an *ex parte* order taken before the defendants were subpoenaed to appear in the cause. When the statute authorizes such testimony to be taken if "required by the court," it does not refer to such a requirement or order as that which was made in this case. If an *ex parte* order can be got in this way, the statute would be practically abrogated. The reservation of power in the court to *require* the evidence to be taken was made in order to provide for such extreme and special cases as might arise, in which it would be a great hardship not to take it. The court will exercise this power with great care and caution.

This case is one in which it would be eminently improper to allow the evidence. The complainant seeks to set up a parol trust in property conveyed away by him over twenty years ago, and possessed by the grantee and his assigns ever since. It would be most dangerous to allow a party to prove his own case under such circumstances, after his grantee was dead. Whether it is provable at all is another question, not now before the court. But no man's property would be safe under such a rule of evidence. Of course, the wife is incompetent to testify for or against her husband.

The fact that the Bank of Mobile has filed a cross bill in the case can make no difference. The order to examine the parties is taken on behalf of the complainant, not on behalf of the bank, and, if it were taken on behalf of the bank, it would not help the case. The bank is not the "opposite party" referred to in the act who is authorized to call the plaintiff as a witness. The "opposite" party meant is that party against whom the evidence is sought to be used. The interests of the complainant and of the bank in the matter are the same.

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The testimony is clearly incompetent and must be disallowed, and the depositions suppressed.

It is urged that the witnesses were old and infirm, and, therefore, that the order to take their testimony was strictly regular under the 70th rule in equity. That rule was not originally intended for the examination of a party; and it may be questioned whether, under any circumstances, it ought to be extended to the case of a party propounding himself as a witness. But it certainly cannot legalize testimony taken as the plaintiff's has been taken in this case.

It may also be urged that the order for taking the testimony must stand until it is regularly discharged. It is undoubtedly the general rule that, after the close of the term in which an order is made, it must stand until it is regularly discharged. But orders obtained upon motion may be discharged upon motion; and *a fortiori*, orders obtained *ex parte* may be thus discharged which have never been assented to, but always resisted by the other party; and a motion to suppress depositions fairly brings up the regularity of an *ex parte* order directing them to be taken, as well as the competency of the witnesses examined, if the party moving to suppress has never done anything to waive the objection.

From an examination of the minutes and files in this case, I am satisfied that the defendants have taken every opportunity fairly in their power to express their opposition to the testimony of these parties, as well as to the taking of it by deposition.

The motion to suppress the depositions will be granted; but, as they were taken under an order of the court, though an irregular order, the cause will be continued until the next term, and the time for taking testimony enlarged until the rule day in September, to enable the complainant to take other testimony in the cause, with like liberty to the defendants.

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Lockhart vs. Horn.

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LOCKHART VS. HORN.

1. The United States circuit court has no jurisdiction of a cause in which the complainants, and a part only of the defendants, are citizens of the same state, although such defendants voluntarily appear and answer without objecting to the jurisdiction.
2. In such a case, the citizenship of the parties being disclosed by the bill, and no objection to the jurisdiction being made *in limine*, complainants may dismiss their bill as to the obnoxious defendants, and hold it as to the others.
3. The fact that civil war was raging in Alabama and other states, from the date of the act of secession in 1861, to the close of hostilities in 1865, is not sufficient ground for suspension of legal remedies and acts of limitations as between citizens of the Confederate States, the courts of the state having been open to all citizens of the Confederate States, and there being no law to prohibit them from resorting thereto.
4. Unless a country is actually occupied by hostile forces, and its laws and courts are suppressed, the courts are not allowed the discretion to decide when, and when not, the statutes of limitation are in operation, as between its own citizens only.
5. A law or ordinance which revives a claim already barred by the statute of limitations interferes with vested rights, and is unconstitutional.
6. All transactions, judgments, and decrees which took place in conformity with existing laws in the Confederate States, between citizens thereof during the late war, except such as were directly in aid of rebellion, are good and valid; but those in aid of the rebellion are void.
7. A deposit by an executor of a large sum of money, belonging to the estate, in the Confederate States depository, was a direct contribution to the resources of the Confederate States government, and the executor was refused a credit therefor in the settlement of the estate.
8. Where an executor might have collected the assets of the estate in good money before the war, but failed to do so, he was not allowed to discharge the balance found due from him, by payment in confederate treasury notes.

IN EQUITY. Submitted on pleadings and evidence for final decree.

*Messrs. John T. Morgan, Wm. Boyles and James W. Lapsley,*  
for complainant.

*Messrs. L. Gibbons, S. J. Cumming and T. H. Price,* for defendant.

BRADLEY, Circuit Justice. The complainants, Sarah A. and

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Narcissa Lockhart, are daughters of John Horn, deceased. The defendants are his only son, John A. C. Horn, and his three other daughters, Frances L. Bryan, Eliza P. Nabors and Mary McPhail, and their husbands, and the administrator of Rebecca Horn, widow of the deceased.

The bill is filed for two objects :

First. To contest the validity of the will of John Horn, deceased, admitted to probate in Marengo county, the 13th of September, 1858, at the instance of John A. C. Horn, executor and principal devisee.

Second. To recover from said John the distributive share of said complainants in the estate of their father ; or in case the will be not broken, to recover from him the balance due them as legatees under the will.

The complainants are residents of Texas ; the defendants are all residents of Alabama, except Mary McPhail and her husband, Wm. McPhail, who reside in Texas.

The relief sought is sought entirely against John A. C. Horn ; but the other defendants are made parties, because they have an interest in the estate.

Wm. McPhail and wife, though not served with process, have voluntarily appeared and put in an answer admitting the truth of the statements made by the bill, and praying a decree for Mary McPhail's share of the estate.

The first aspect of the bill is founded on a statute of Alabama, which, after prescribing the mode in which a will may be propounded and contested, enacts that any person interested in a will, who has not contested it as provided by the act, may, at any time within five years after the admission of the will to probate, contest its validity by bill in chancery.

The complainants allege that they did not contest the will when it was admitted to probate ; and as to the limit of five years for filing the bill, they plead the civil war, and the laws passed in suspension of the statutes of limitation.

The leading facts, as they appear by the pleadings and evidence, are as follows :

John Horn, of Marengo county, Alabama, died March, 1858,

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leaving a large estate in lands, negroes and personal property; and leaving a widow and six children.

Some time about May, 1857, the deceased, John Horn, made a will, which was in existence up to a short time prior to his death. His son, John A. C. Horn, alleges that it was fraudulently purloined and destroyed, either during the decedent's illness or after his death; the daughters allege that their father voluntarily cancelled and destroyed the will before his death.

Soon after the death of John Horn, his son procured himself to be appointed administrator *ad colligendum*, and, by petition in the probate court of Marengo county, set up a paper which he alleged to be a true copy of John Horn's will, with allegations as to its spoliation, etc., and praying that it might be established as his will.

The widow and all the children residing in Alabama were duly cited to appear and show cause why the alleged will should not be admitted to probate. As the complainants and McPhail and wife resided in Texas, a notice of the time and place set for the hearing was duly published in a newspaper, as authorized and required by the laws of Alabama.

By these laws, any party in interest who wishes to contest a will offered for probate must file in the court allegations in writing, stating the grounds of contestation. Rev. Code, sec. 1953. It appears, from the record of the proceedings, that two of the daughters, Frances R. Bryan and Elizabeth P. Dumas, afterwards Nabors, in their proper persons, and Mary McPhail with her husband Wm. McPhail, by their attorney, appeared and contested the probate. It does not appear that the others made any legal contestation. The cause was tried by a jury according to the laws of Alabama, and the will was established by their verdict and the judgment of the court on the 13th of September, 1858, and, on the 22d of November following, letters testamentary were issued to John A. C. Horn, as the executor.

By the will thus established, the homestead plantation of 720 acres was given to John A. C. Horn, after his mother's decease, and a smaller tract of 208 acres was directed to be sold,

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and the proceeds divided equally amongst the daughters. The residue of the estate, after charging the daughters with certain advances made to them by the testator in his lifetime, was to be equally divided between all the children. The widow repudiated the will and claimed her dower.

On the 29th of December, 1858, by order of the court, a division of the slaves of testator, seventy-eight in number, was made between his widow and children, by commissioners appointed for the purpose, and upon a valuation then made, the daughters being charged with the respective advances named in the will as made to them in their father's lifetime. They severally, with their husbands, receipted for the slaves which were assigned to them in this division. Wm. A. Lockhart gave a receipt for his wife, as follows:

"Received of John A. C. Horn, executor of John Horn, deceased, the following slaves, to wit: (giving their names and values), which is in full of my distributive share of the negro property of said John Horn, deceased, in the division of the same, the commissioners having charged me with \$4,400, the amount of the advance mentioned in the will of the said John Horn, deceased. W. A. LOCKHART, *Agent for S. A. Lockhart*. Attest: E. R. SHOWALTER."

A similar receipt was given by Narcissa Lockhart and her husband, who was then living. At the same time the executor made payments of money to the daughters, which were duly receipted for. The receipt given by Wm. Lockhart was as follows:

"Received of John A. C. Horn, executor of John Horn, deceased, two thousand and eighty dollars, in part payment of my claim in the estate of John Horn, deceased, this January 10, 1859. W. A. LOCKHART, *Trustee of S. A. Lockhart*."

A similar receipt of the same date and amount was given by Narcissa Lockhart and her husband.

In October term, 1859, of the same probate court, Jno. A. C. Horn, the executor, filed a partial account of his administration, including his sales of property and the said division of slaves. Due notice of exhibiting the account was published as

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required by the laws of Alabama, and William Lockhart and his wife, Charles J. C. Lockhart and Narcissa, his wife, William McPhail and his wife, and Frances L. Bryan, contested the account as to various items thereof. A decree was finally made on the 21st of May, 1860, by which it was declared that the executor had in his hands for distribution \$10,783.50, proceeds of the land to be sold and divided among the daughters, and \$5,159.21, proceeds of personal property, to be divided among the widow and children in accordance with the will, specifying the amount payable to each. By this account it appeared that Charles Lockhart and Narcissa, his wife, were indebted to the executor a small sum, he having already made them a payment as before stated, and that there was due from him to Wm. Lockhart and Sarah, his wife, \$608.09 over and above the payments made to them.

This sum was paid, and Wm. Lockhart gave a receipt for the amount, as follows: "Received of Jno. A. C. Horn, executor of the last will and testament of John Horn, deceased, six hundred and eight dollars and nine cents, in full of the amount decreed by the probate court of Marengo county, in May, 1860, in favor of my wife, Sarah A. Lockhart, and myself, in partial settlement made by said John A. C. Horn under said will, May 26, 1860. (Signed) W. A. Lockhart. (Witness) G. W. Colton."

In August, 1860, and January, 1861, citations were issued at the suit of the daughters, or some of them, to call the executor to a final account. There was still a balance in his hands due from James B. Craighead, the purchaser of the real estate, devised for the benefit of the daughters. It had been sold on the 8th of January, 1859, on a credit of twelve months, for \$10,400, of which \$6,240 had been paid in good money by the purchaser, Craighead, and included in the partial account settled in May, 1860. But there was still a balance due of \$4,160 besides interest. Craighead died, according to Horn's testimony, in June, 1859. His wife took out letters of administration on his estate. By the laws of Alabama, an administrator cannot be sued until after six months from the grant of

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letters of administration, and judgment cannot be rendered until the expiration of eighteen months therefrom. The whole sum became due in January, 1860, and suit could have been immediately brought and judgment could have been obtained by the month of January, 1861. But the executor did not bring suit, and did not collect the balance until October, 1862, when he was obliged to take confederate notes worth at that time only about thirty-six cents to the dollar. Of these he received the sum of \$5,075.20 in satisfaction of the debt. He kept this money and other money of the estate received in confederate funds in his hands until March, 1864, when under laws then existing, he deposited \$7,900 thereof, as executor, in the Confederate States depository office at Selma, Alabama, and received a certificate entitling him to Confederate States four per cent. bonds to that amount. The receiving of the money by Horn, as executor, in confederate notes, and the investment of said notes in confederate bonds, were in strict accordance with laws passed by the legislature of Alabama in November, 1861, and November, 1863, whilst that state was engaged in civil war with the United States.

In May, 1864, the final accounts of the executor were passed in the probate court after due publication of notice, and he resigned his executorship in accordance with the laws of Alabama. The final decree recites the fact, that it appeared that the executor had invested the moneys of the estate in his hands in four per cent. confederate bonds, and approved and confirmed the same, and directed the several shares of the widow and children of the deceased to be paid to them in said bonds. The amount due to the complainants, according to the decree, was, to Wm. Lockhart and Sarah A., his wife, \$1,295.78, and to Chas. J. Lockhart and Narcissa, his wife, \$1,209.19.

Upon this case the following questions arise:

1. The first question is, as to the jurisdiction of the court. Two of the defendants, McPhail and wife, are of the same state with the complainants. Is that fact fatal to the jurisdiction, these defendants having voluntarily appeared and answered

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and not having objected to the jurisdiction, and no objection of that kind being taken until the present time, the fact of their residence in Texas, however, appearing in the bill itself? Were this an original question, I should say that the fact of a common state citizenship existing between the complainants and a part only of the defendants, provided the other defendants were citizens of the proper state, would not oust the court of jurisdiction. It certainly would not under the constitution. The case would still be a controversy between citizens of different states. But the strict construction put by the courts upon the judiciary act is decisive against the jurisdiction; and I am bound by it. Nevertheless, the case is such that the complainant may dismiss his bill as to the obnoxious defendants and hold it as to the others. I will permit him to do so. This should be allowed in all cases where the objection is not made *in limine*.

In this case I do not regard McPhail and wife as absolutely essential parties. The suit is really a suit against John A. C. Horn. Whether the plaintiffs are successful or unsuccessful will make no difference as to the rights of McPhail and wife. They cannot contest the will, for they have once done so. If the complainants succeed in breaking the will they may, perhaps ultimately participate in the advantages of it, if such is the law of Alabama. But it will be their good fortune rather than their right. Any rights which they may have will be unprejudiced by the result of the suit. I will therefore allow the complainants to dismiss the bill as to them.

2. The next question relates to the limitation of five years. The will was admitted to probate on the 13th of September, 1858; this suit was instituted the 15th of November, 1867—a period of nine years, two months and two days; too late by four years, two months and two days, unless the statute was suspended by some law or other cause. The complainant relies on several grounds for a suspension of the limitation: First, the fact that civil war was raging in Alabama and other states from January 11, 1861, when the act of secession was adopted, to the close of hostilities and the restoration of order

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in the summer or fall of 1865. I do not agree that this was a sufficient ground for the suspension of legal remedies and acts of limitation as between the citizens of the Confederate States, any more than it would be as between citizens of states which adhered to the federal government. It is a fact that the courts of Alabama were open to all the citizens of the Confederate States, and there was no law to prohibit them from resorting thereto. Were statutes of limitation of the several states, or of any of them, suspended during the war of 1812, because the British forces occupied part of our territory, or because the war was raging in portions of the country? Unless a country is actually occupied by hostile forces, and its laws and courts are suppressed, it would be giving to the courts too large a discretion to allow them to decide when and when not the statutes of limitation are in operation as between their own citizens only.

This being a question as to the general effect of a war on remedies and statutes of limitation, I do not feel that I am bound by the decisions of the supreme court of this state.

The next ground relied on by the complainants for a suspension of the statutes is the ordinance of the 21st September, 1865, passed by the constitutional convention assembled at Montgomery under the proclamation of President Johnson, by which it was declared that in computing the time necessary to create the bar of the statutes of limitation and nonclaim, the time elapsing between the 11th of January, 1861, and the passage of that ordinance should not be estimated. Suppose the acts of this convention to have been valid as laws until abrogated and repealed (for which many reasons may be urged), still the whole period of five years had already run when this ordinance was passed; and the effect of it, as applied to this case, was to revive a claim already extinct. This would be to interfere with rights already vested, and would be an unconstitutional application of the law.

The remaining ground for supposing that the limitation of the statute was suspended is the act of congress of June 11th, 1864 (13 Stat., 123), by which it is enacted in substance, that

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whenever during the existence of the rebellion, resistance to the laws or interruption of the ordinary course of judicial proceedings prevented the prosecution of an action, the statute of limitation should not run. But this statute has in no case been construed to apply to a case arising between citizens of the same section of a country; and if it may ever be so applied, I think it cannot be in this case. For it is not true that the proceedings of the courts here were so interrupted as to prevent the prosecution of suits therein by citizens of any of the Confederate States except for brief periods of time. I am not referred to any other laws affecting this question.

In my judgment, therefore, the statutory limitation for bringing this suit as a means of contesting the validity of the will of John Horn, had expired when the bill was filed, and as to that portion of the relief sought, the bill must be dismissed.

I am further of opinion that the complainants by their own acts were estopped from filing a bill for that purpose. After the will was admitted to probate, they twice received, without objection or protest, dividends of the property of John Horn, founded on the directions of his will, and gave to John A. C. Horn, as executor thereof, acquittances therefor. In this they recognized the will, and recognized John A. C. Horn as the executor thereof, and they cannot now come into a court of equity without any allegation of fraud or concealment, or newly discovered evidence and claim to have the will set aside.

8. But the other ground of relief still remains, namely, the claim of the complainants against the executor for the balance of their legacies.

I see nothing in the case to question the accuracy of the amounts found due to the complainants by the decree of May, 1864. The question is whether the defendant can exonerate himself by paying those amounts in confederate bonds, in accordance with the decree.

As a general rule, in my judgment, all transactions, judgments and decrees which took place in conformity with existing laws in the Confederate States between the citizens thereof during the late war, except such as were directly in aid of the rebellion,

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ought to stand good. The exception, namely, of such transactions as were directly in aid of the rebellion is a political necessity required by the dignity of the United States government, and by every principle of fidelity to the constitution and laws of our common country. By this rule the present case must be judged. And by this rule the deposit of the \$7,900, money of the estate, in the depository of the Confederate States at Selma, cannot be sustained; it was a direct contribution to the resources of the confederate government.

The defendant then must be considered chargeable with the confederate treasury notes which he so deposited. And the next question is, Whether he can discharge himself by paying the legacies in such notes? It will be remembered that the greater part of that balance in his hands had become due in January, 1860, and he does not show us when the remainder became due. It is fair to suppose, therefore, that it all became due as early as that date. He could not have obtained judgment against Craighead's estate until January, 1861, it is true. But it does not appear that he could not have collected the money by the exercise of proper diligence without suit. And if he had brought suit and perfected his judgment by January, 1861, he would still have been in time to have collected the amount due in good money. The complainants were urging him to proceed as early as August, 1860. He was cited to settle up his account, and the citation was repeated in January, 1861.

I cannot but regard the executor as liable for the balance due in lawful money, with interest to the present time. He has not shown sufficient excuse for not collecting the funds of the estate before the war commenced. Had he shown such an excuse, I should have felt bound to charge him only with the value of the funds at the time when he received them, with a reasonable allowance of time for making a settlement.

It may be urged that the decree of the probate court made in May, 1864, is conclusive on the question of the executor's diligence in the collection of the money due the estate. But a careful examination of that decree shows that this question was

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not passed upon by the court. By the laws then existing, an executor was exonerated by investing his funds in confederate bonds. Horn having thus invested the funds in his hands, the court did not deem it necessary to look farther, but decreed him to be within the protection of the statutes. That decree, as before shown, cannot avail him in this case. Had the court decided the question of diligence, I should have deemed its decision on that point conclusive.

A decree will be made for the amount found to be due the complainants by the settlement in May, 1864, with lawful interest thereon to the present time.

NOTE.—Affirmed by United States supreme court. See *Lockhart v. Horn*, 17 Wall., 570.

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DECEMBER TERM, 1871.

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## BERLIN &amp; SON VS. JONES.

An averment in a declaration that a party defendant is a citizen of the southern district of Alabama is equivalent to an averment that he is a citizen of the state of Alabama, and is a sufficient averment of the latter fact.

This cause was heard on demurrer to the declaration.

*Mr. John P. Southworth*, for plaintiff.

*Mr. Peter Hamilton*, for defendant.

WOODS, Circuit Judge. The ground of demurrer is that it does not appear from the declaration that the court has jurisdiction of the matters and things therein complained of.

The reason why it does not appear that the court has jurisdiction defendant's brief alleges to be: because the defendant is not averred to be a citizen of the state of Alabama, but of the southern district of Alabama.

The judicial act, sec. 11 (1 Stat., 78), provides that "the cir-

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cuit courts shall have original cognizance of all suits of a civil nature \* \* when the suit is between a citizen of the state where the suit is brought and a citizen of another state." The citizenship of plaintiffs in the state of New York is distinctly averred, and the question presented is, whether it is sufficiently averred that defendant is a citizen of the state of Alabama.

When the jurisdiction depends upon the character of the parties, it must be positively averred upon the record. *Bingham v. Cabot*, 3 Dall., 382; *Abercrombie v. Dupuis*, 1 Cranch, 342; *Wood v. Wagon*, 2 id., 9; *Capron v. Van Noorden*, 2 id., 126; *Brown v. Keene*, 8 Peters, 112; *Jackson v. Ashton*, 8 id., 148; *Michaelson v. Denison*, 3 Day, 294.

In the case in 3 Dallas there was no averment whatever as to the citizenship of the defendant, and on that ground judgment was reversed.

In *Abercrombie v. Dupuis*, 1 Cranch, the plaintiff was averred to reside in the state of Kentucky, and the defendant was called "Charles Abercrombie, of the district of Georgia," there being no averment either that the plaintiff was a citizen of Kentucky, or the defendant of Georgia.

In *Wood v. Wagon*, 2 Cranch, the plaintiff is described as a citizen of Pennsylvania, and the defendant as "James Wood of the state of Georgia."

In both the cases last named the objection was taken that it did not appear that the plaintiff and defendant were citizens of different states, and upon that ground the judgment was reversed upon the authority of *Bingham v. Cabot*, 3 Dallas, *supra*.

In *Michaelson v. Denison*, 3 Day, the plaintiff was described as Charles Michaelson of Bass End in the Island of St. Croix, a foreign subject, viz., a subject of the King of Sweden. LIVINGSTON, J., said: "By the constitution of the United States the judicial power may extend to cases between citizens of a state and foreign subjects, but congress in the provision of the judicial act under that clause has restricted it to cases in which an "alien" is a party. He must be stated to be an alien in express terms. The court will take nothing by implication.

Besides it is a *non sequitur* that because a man is a subject of a foreign power he is an alien ; he may be at the same time a naturalized citizen of this state."

In *Brown v. Keene*, 8 Peters, 112, the petition averred that the plaintiff, Richard R. Keene was a citizen of the state of Maryland, and that the defendant, Brown, was a citizen or resident of the state of Louisiana, holding his fixed and permanent domicile in the parish of St. Charles. The judgment was reversed because the petition did not positively aver that the defendant was a citizen of the state of Louisiana, but in the alternative that he was a citizen or resident, and because consistently with this averment he might be either.

The decisions of this court, MARSHALL, C. J., goes on to say, require that the averment of jurisdiction should be positive, that the declaration should state expressly the fact on which the jurisdiction depends.

It will be observed in these cases the judgments were reversed.

1. Because there was no averment whatever touching the citizenship of the plaintiff or of the defendant, or

2. Because the averment of the declaration as to one of the parties was, that he was of a named state, without distinctly alleging citizenship therein, or

3. That the fact of citizenship was stated in the alternative, or

4. That a party plaintiff was averred to be a foreign subject when the jurisdiction of the court extended only to aliens.

It seems clear that the case at bar is not to be controlled by either of the cases cited. Here citizenship is distinctly averred, but it is alleged to be citizenship in the southern district of Alabama, and not of the state of Alabama, and the precise question presented is, whether under the rules of pleading, an averment that a party is a citizen of the southern district of Alabama is a sufficient averment of his citizenship in the state of Alabama?

It is a rule of pleading that it is not necessary to state matter of which the court takes judicial notice. Therefore, it is unnecessary to state matter of law, whether of the common law or public statute law. By a public act the court knows judicially

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that the southern district of Alabama is in the state of Alabama. What the court notices judicially is taken for granted, or as if set out at length in the pleading. So that this pleading must be considered precisely as if the averment objected to was that the defendant is a citizen of the southern district of Alabama, which is part of the state of Alabama. Taking the averment as it stands in the declaration, in connection with the other fact which the court assumes judicially to be the fact, I think the citizenship of the defendant in the state of Alabama, is sufficiently averred.

I am strengthened in this view by the remarks of MARSHALL, C. J., in the case of *Jackson v. Ashton*, 8 Peters, *supra*.

In that case the citizenship of the plaintiff was well averred; the only question was, Whether that of the defendant as a citizen of Pennsylvania was also well averred? He was described simply as William E. Ashton, of the city of Philadelphia.

The Chief Justice said: "The only difficulty which could arise as to the dismissal of the bill presents itself upon the statement that "the defendant is of Philadelphia." This it might be answered shows that he is a citizen of Pennsylvania.

"If this question were new, the court might decide otherwise; but the decision of the court in the cases which have heretofore been before it has been expressed upon the point, and the bill must be dismissed for want of jurisdiction."

I think the fair inference from this language is that if the averment had been that the defendant was a *citizen* of Philadelphia, the court would have held the averment good, taking judicial notice of the fact that Philadelphia was in the state of Pennsylvania. One thing is clear, that the court thought that the decisions on this question had already been pushed too far. We are asked to go a step beyond any decision heretofore made, and say that the averment that a party is a citizen of the southern district of Alabama, is not a sufficient averment that he is a citizen of the state of Alabama.

In some of the cases which I have examined, the party is alleged to be a citizen of the *district* of Georgia, for instance. No

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objection seems to have been taken to this form of averment, but it was considered good both by court and counsel.

The citizenship of defendant in the state of Alabama is, I think, sufficiently averred, and plea that he was not a citizen of Alabama would be a good traverse to the averment of the declaration.

Demurrer overruled.

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**DELANO VS. CARGO OF THE GALLATIN.**

1. To make a case for general average, the property saved and the property sacrificed must be exposed to a common danger; the sacrifice of a part must contribute to the saving of the residue, and the sacrifice must be voluntary.
2. There can be no contribution for damage caused by the common danger to which both ship and cargo are exposed.

**ADMIRALTY APPEAL.**

The facts are stated in the opinion of the court.

*Mr. Edward S. Dargan*, for libellants.

*Messrs. Peter Hamilton and T. A. Hamilton*, for claimants.

WOODS, Circuit Judge. The facts were these: On the 17th of April, 1868, the ship *Albert Gallatin* was lying at anchor in the bay of Mobile, about twenty-five miles below the city of Mobile. She was loading with a cargo for Liverpool, and had on board 3,511 bales of cotton, most of which had been stowed, but 209 bales were still on deck, and 160 other bales were on the way to the ship on a lighter, but had not yet reached her. Delano, the master was not on board, but the ship was in charge of Russell, the first mate.

On the morning of April 17, between 2 and 3 o'clock, the ship was struck by lightning, and, immediately after, her cargo was discovered to be on fire in the after hold, under the cabin floor. The crew immediately commenced pumping water on the fire through the cabin floor, but without effect, to put it out. The mate then ordered holes to be cut in the ship's

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side to sink her. This effort had not succeeded when salving vessels came alongside, and the ship and cargo were surrendered by the mate to the salvors. They at once cut large holes in the ship's side, and, by means of steam pumps, forced large quantities of water into the hold, by which, after some hours, the ship was sunk. A large part of her hull still remained out of water. The salvors continued to pump water upon the ship, and succeeded in extinguishing the fire.

The salvors then removed the cotton, pumped out the ship, towed her to an anchorage, when she was raised by the salvors without expense to her owners.

The ship and cargo were libelled for salvage. The ship was delivered to the master on stipulation. He sold her, and the owners received the proceeds of the sale, and contributed nothing to pay the decrees for salvage. All costs and expenses of the litigation, the handling of the property, and the salvage decrees were paid exclusively from the proceeds of the sale of the cargo, the ship contributing nothing.

The cargo was insured by underwriters, who have paid the losses, and waived abandonment of the cargo, and they have received the proceeds of the sale of the cargo, after paying the salvage decrees, costs, etc. There remains, however, in the hands of A. J. Ingersoll & Co., defendants, the sum of \$19,257.47, being the proceeds of a portion of the cargo which was sold after the proceeds of a former sale had been seized by order of the admiralty court.

After the sale of the ship, she was taken to New Orleans and repaired. It appears from the evidence of the witnesses, Vallette and Marcy, that the repairs put on her, made necessary by reason of the fire, exceeded \$33,000, while the damage produced by the scuttling and sinking was a mere trifle. Marcy testified that "the scuttling produced no injury to the ship. Twenty-five dollars would have covered all the repairs caused by the scuttling." This witness is corroborated in this evidence by Joseph Loach. Vallette testifies: "I saw no damage from the scuttling of the ship. The damage was caused by the fire. It took a little over two months to repair

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the vessel. These repairs were made for the damage done by the fire, and not by the submersion."

These are the facts as admitted by the parties, or clearly established by the proof.

The libel alleges that the ship was sunk and greatly damaged, voluntarily, for the sole purpose of saving the cargo, and that thereby the cargo was saved; that the sinking of the ship was the loss of the freight and ship, in all amounting to the value of \$70,000, and that the libellants are entitled to participate in the average to that extent, subject to a deduction of the net proceeds of the sale of the ship after the fire.

This case is governed by the well known rules of admiralty law, and it appears to me admits of easy solution.

According to the decision of the supreme court in *Columbian Assurance Company v. Ashby & Stribling*, 13 Pet., 331, pronounced by Mr. Justice STORY, the leading limitations and conditions to justify a general contribution are: "First, that the ship and cargo should be placed in a common imminent peril; second, that there should be a voluntary sacrifice of property to avert that peril; and thirdly, that by that sacrifice the safety of the other property should be presently and successfully attained." See also *Barnard v. Adams*, 10 How., 803; 1 Parsons on Maritime Law, 288, where the rule is sufficiently stated, thus: "There must be a common danger, a voluntary loss, and a saving of the imperilled property by that loss."

In the case now on trial, the proof shows a common danger to ship and cargo and a saving of the imperilled property by the scuttling of the ship, and that the scuttling was voluntary. I think it is clear that this is a case for general contribution for any loss occasioned by the voluntary sacrifice of ship to save the cargo, and that the fact that the loss of both ship and cargo was inevitable unless saved by the sacrifice, does not change the rule. *Columbian Assurance Co. v. Ashby* and *Barnard v. Adams*, *supra*. But I am just as clear that the damage for which general average is claimed must be the result of the voluntary sacrifice of a part to save a part. If the damage to

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the Albert Gallatin had resulted from the scuttling and sinking of the ship, the cargo should bear its proportion of the loss. But libellant claims general average for the loss resulting from the fire as well as from the sinking of the ship. There are, it appears to me, insuperable obstacles to the allowance of this claim. The loss by fire was the result of the common peril to which both ship and cargo were subjected. The damage from fire was not a contribution of a part to save a part. It was not a voluntary sacrifice any more than the loss of 204 bales of the cotton, part of the cargo by fire, was a voluntary sacrifice. The loss to the ship by fire did not contribute to the saving of the cargo. In a word, this loss has none of the elements which would entitle the owners of the ship to contribution. If libellants could show that they voluntarily sacrificed their ship by fire to save the cargo, and that the cargo was thereby saved, they would bring the case within the rule. Can we say that by the burning of the ship the safety of the cargo "was presently and successfully attained?" The only salvation for either ship or cargo was in submerging both. Whatever loss was occasioned by this ought to be borne by all the imperilled property *pro rata*.

The loss of the freight was complete before the ship was scuttled. At 7 o'clock, A. M., of April 19, not only was the cargo on fire, but the ship was on fire, the flames breaking through the cabin floor. (Evidence of Captain Lee.) The ship was in no worse condition for proceeding on her voyage after than before the scuttling, so far as damage from the sinking of the ship is concerned. Notwithstanding the submersion of the ship, she continued to burn and sustained such damage from the fire that she only brought \$6,000, and it required \$33,000 to repair the ravages of the fire. Can we then reasonably attribute the loss of the freight to the scuttling of the ship, when notwithstanding the scuttling the fire left nothing but the hulk of the ship; left her totally disabled, even if she had been afloat, from pursuing her voyage and earning her freight.

The evidence already cited, and there is nothing in the record to contradict it, shows that the ship sustained no damage,

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or but a very trifling one, from being scuttled. The cost of raising her and towing her to a safe anchorage, was paid by the cargo. The expense of repairing the damage caused by the scuttling, is placed at \$25. This is so inconsiderable a trifle, as to be unworthy the consideration of the court. *De minimis non curat lex.*

I think there is no case here for general contribution. The libel will therefore be dismissed, with costs.

# NORTHERN DISTRICT OF FLORIDA.

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JACKSONVILLE, AT CHAMBERS, MAY, 1871.

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VOSE VS. REED and others, Trustees.

1. In a suit brought in the circuit court of the United States, by reason of the citizenship of the parties, a corporation of the state, of which the complainant is a citizen, cannot be made a defendant.
2. If the same corporators, composing such corporation, become incorporated in the state where the suit is brought, the corporation thus formed may be made a defendant.
3. A plea to the jurisdiction of the court must be pleaded by itself, and cannot be set up in the answer under Rule 39, as an answer is an appearance and a waiver of a plea to the jurisdiction.
4. When it properly appears by the record that there is a party over whom the court has no jurisdiction, and who is not a necessary party to the proceedings, the bill will be dismissed as to that party, and retained as to the others.
5. The appointment of a receiver to take and preserve a trust fund is the exercise of a discretion in which all the circumstances are to be taken into consideration. Where the funds are in the hands of trustees, appointed by the legislature, who hold their trust *ex officio*, as high public officers of the state, and especially where one part of the trust involves duties of a public character, the court will be very reluctant to take the fund out of their hands, and will not do so except for the most cogent reasons, such as gross fraud and imminent danger of the trust fund. It will resort to every coercive means of compelling the trustees to perform their duty before resorting to this extreme measure.
6. There is no doubt of the power of the court, as a court of equity, to award attachments for contempt in vacation. As an equitable tribunal, the court is always open.
7. Where parties have been guilty of a technical contempt, in violating an injunction, but declare on oath, that they were not aware of the violation, and submit to the direction of the court, they will be allowed to purge the contempt by undoing or reversing their acts, when it is practicable to do so.

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Vose vs. Reed and others, Trustees.

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APPLICATION for an attachment, as for a contempt, and for the appointment of a receiver, on amended bill and answers of the several defendants and affidavits.

*Messrs. H. R. Jackson, H. Bisbee, Jr., and J. D. Pope*, for complainant.

*Messrs. Peeler, Papy, L'Engle and Drew*, for defendants.

BRADLEY, Circuit Justice. The legislature of Florida, by an act passed January 6, 1855, vested certain public lands, including all swamp and overflowed lands, belonging to the state, in the governor, comptroller, treasurer, attorney general and register, as trustees, to constitute an internal improvement fund, and to serve, amongst other things, as a guaranty of bonds to be issued by certain designated railroad companies for the procurement of iron rails and rolling stock. A certificate of guaranty was to be placed on the bonds of the trustees. In case the interest on these bonds and one per cent. per annum for a sinking fund were not paid by any of the companies, the trustees were authorized to take possession of and sell the road, appurtenances and franchises of the company in default, and to apply the proceeds in purchasing up the bonds or incorporating them with the sinking fund.

The powers given to the trustees were large and various. They were authorized to fix the prices of the lands, to make arrangements for draining them, and to promote their settlement and cultivation by allowing preëmptions and other modes of encouragement.

The Florida Railroad Company was one of the companies included in the benefits of this act, and issued a large number of bonds which were duly indorsed by the trustees. No installments of interest or sinking fund were paid during the war. In November, 1866, the trustees seized and sold the road, and with the proceeds of sale purchased and cancelled a large proportion of the outstanding guaranteed bonds of the company. The complainant held a number of the bonds which were not thus purchased. He filed his bill for relief against the trustees, whom he charged with mismanaging the funds,

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and against other parties and corporations whom he charged with complicity in such mismanagement by obtaining fraudulent purchasers of the lands at nominal prices. He also prayed for an injunction and the appointment of a receiver of the trust fund.

An injunction having been granted in December, 1870, which, as the complainant states, was disregarded, he obtained an order to show cause why an attachment for contempt should not issue, and a receiver be appointed as prayed in the bill.

The case now came up on this order to show cause, and upon answers put in by the defendants denying fraud, and explaining the transactions complained of. But,

I. There was a question as to parties. One of the defendants in the original bill, alleged to have obtained a large fraudulent grant, was called "The New York and Florida Lumber and Land Improvement Company, a corporation created under the laws of New York, but designed to be located and to do business in the state of Florida, and actually located and doing business there." By an amended bill it was alleged that this corporation also exists as a corporation under the laws of Florida, under the name of "The Florida Improvement Company," the same persons who composed the former having associated themselves together and become incorporated under the acts of the assembly of the latter state. The first named corporation being, in law, a citizen of New York, could not be sued in the circuit court of the United States by the complainant, who is a citizen of that state; and the bill was dismissed as to it. The last named corporation the court held to be, in law, a citizen of Florida, being a corporation created by the laws of that state, though originally composed of the same individuals as the former. The company having filed an answer and, among other things, having therein pleaded the above matter to the jurisdiction of the court, it was held that this could not be done. The court, BRADLEY, Circuit Justice, said:

This plea to the jurisdiction cannot be received in this way. A plea to the jurisdiction must be a separate plea. An answer is an appearance, and waives it. The company has ap-

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plied to withdraw its answer and plead anew. This cannot be allowed. As the aim of the court is to do justice between all the essential and proper parties, it will not encourage pleas to the jurisdiction, the object of which is to postpone a judicial consideration of the controversy. When it properly appears by the record that there is a party over whom the court has no jurisdiction, and who is not an essential party to the proceedings, the bill will be dismissed as to that party, and retained as to the others.

Accordingly the bill was dismissed as to one company and retained as to the other.

II. The next question is, Whether the court will appoint a receiver? This is a matter always in the discretion of the court; but as general rule a receiver will be appointed for the purpose of protecting the fund when the complainant has an equitable interest in the subject, and the defendant having possession of the property is wasting it, or removing it out of the jurisdiction of the court. But all the circumstances of the case are to be taken into consideration, and if the case be such that a greater injury would ensue from the appointment of a receiver than from leaving the property in the hands now holding it, or if any other considerations of propriety or convenience render the appointment of a receiver improper or inexpedient, none will be appointed. In this case the trustees having possession of the trust fund and property are public officers of the state and trustees *ex officio*. And it cannot with propriety be said that their appointment is a mere *designatio personarum*. The governor of the state, the treasurer, the comptroller, and other state executive officers are named trustees for a purpose. The state has a great interest in the trust. It is not merely to preserve the fund as a security for the payment of railroad bonds that the trust is created, but to provide for the drainage and reclamation of the lands, and their settlement and cultivation. These are political objects of the most important character. To attain these objects they are authorized to grant preemption rights for not more than a section of land to each settler. Increase of population and development of resources

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are primary elements in the prosperity of a state ; and these, as well as railroad improvements, are made objects of the trust. Drainage, reclamation, development, immigration, are all of them objects of first national and state importance ; and none of them will be likely, in the end, to depreciate the value of the pecuniary security afforded by the lands, whether for the payment of railroad bonds or anything else of like character.

Now these public and political objects of the trust make it extremely fitting that the chief executive officers of the state should administer the fund. And it must be a very strong case, indeed, which will induce the court to take the property out of their hands and put it into the hands of its own officers. The legislature has seen fit to intrust the chief officers of the state with these important duties, and it would show a great disrespect to this coordinate branch of the government for the judiciary, on light grounds, to displace these officers from the trust, and to put appointees of its own in their stead.

If they are guilty of breach of duty, they can be enjoined ; they can be made personally responsible ; the fund can be followed in the hands of persons getting hold of it in a fraudulent manner. It would be very strange if the courts could not in some way secure the rights of parties having an interest in the fund, without removing from the trust those official personages to whose administration it has been intrusted by the legislature.

The court will not shut its eyes to the fact that these officers are constantly being changed by the suffrages of the people of the state and the constituted power of appointment ; and it would be very inconvenient and awkward for the court, by the appointment of a receiver, to withhold the property from the possession and management of new state officers, fresh from the confidence of the people, and against whom no charges of incapacity or want of integrity have been made. To my mind, it seems to be a case in which, if a receiver can be appointed at all, the appointment ought not to be made until every other remedy has been tried in vain.

Besides, looking at the peculiar and important duties attach-

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ing to the trust, how could a receiver, how could a court, without the greatest embarrassment, administer the trust? How could the court take cognizance of the requirements of a vast political territory in reference to drainage, development, pre-emption and population? It would be a Herculean task for a court, or the receiver of a court to perform.

I do not feel that I ought to take the trust fund out of the hands of the state officers, in this case, and place it in the hands of a receiver. The motion for a receiver is therefore denied.

III. The next question is, whether the defendants have been guilty of a contempt by violating the injunction granted by Circuit Judge Woods. A preliminary question is raised by the defendant, who contends that the court has no power to inquire into a contempt for disobedience to an injunction except at a regular term of the court. Whatever may have been the power of the court prior to the act of August 23, 1842 (5 Stat., 516), I have no doubt that since that statute the motion for an attachment on the equity side of the court may be made at any time. By that statute it is declared that the circuit courts as courts of equity shall be deemed always open for the purpose of filing libels, bills, petitions, answers, pleas and other pleadings, for issuing and returning mesne and final process and commissions, and for making and directing all interlocutory motions, orders, rules and other proceedings whatever, preparatory to the hearing of all causes pending therein upon their merits. An attachment is frequently necessary to expedite a cause, as for example, on the return of a subpoena, which the person subpoenaed refuses to obey. The 7th rule in equity declares that the process of subpoena shall constitute the proper mesne process in all suits in equity in the first instance, to require the defendant to appear and answer the exigency of the bill; and unless otherwise provided in the rules, or specially ordered by the circuit court, a writ of attachment, and if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession as the case may require, shall be the proper process to issue for the purpose of

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compelling obedience to any interlocutory or final order or decree of the court. If an attachment could not be issued, for example, to compel the attendance of a refractory witness, except in open court, the business of the court would be liable to be sadly impeded in cases of importance and great public feeling. I have no doubt that an attachment may be applied for in equity at any time, when there is occasion for the use of a writ.

We come then to the question, whether the defendants have violated the injunction, and so rendered themselves amenable to an attachment. The complainants by their petition allege that they have done so in several particulars which will be separately examined.

1. The sale of 300,000 acres of land, to E. H. Studwell, is alleged to be a direct violation of the injunction; I do not see how it can be seriously contended that it is not. If not a direct violation, it is at least a palpable attempt at an evasion, and must be treated as such. But as the defendants have, in their answer, stated that they acted in good faith, not supposing that they were violating the injunction, and that they desire to act in obedience to the views of the court, it will be proper to allow them an opportunity to retrieve the error which they have committed. I shall therefore order that an attachment do issue against them, unless on the first day of the next term of the court, a cancellation of the deed of Studwell be produced.

[A similar order was made with regard to the 100,000 acres conveyed to the Florida Improvement Company. But as to the remaining charges of violation of the injunction, the court, after an examination of the answers and affidavits, considered that they were not substantiated. The motion to dissolve the injunction was denied.]

As to the general powers of the trustees, and the degree of control which the court will exercise over them, the presiding justice remarked, in substance, as follows:

The discretion with which the law has invested the trustees on the management of the fund is very large, and so long as they act in good faith and not palpably in violation of their

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**The United States vs. Bettilini.**

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trust, the exercise of that discretion cannot be interfered with. It is *their* discretion, and not that of the court to which the state has intrusted the management of this important fund, consisting as it does, of the whole public domain of the state.

But if the trustees are not acting in good faith ; if they are acting fraudulently, and in collusion with the donees and grantees of the various large grants which they have made, they will not only be personally liable to answer to the complainant and other bondholders similarly situated, for the payment of their bonds ; but the fraudulent sales will be set aside, and the property sold will be followed by the court, and put up for sale at public auction ; and any proceeds of sales which ought to be in the hands of the trustees, but which, from their default or fraud, are not forthcoming, will also be followed in their hands, or in the hands of those who have them, and applied to the purposes of the trust.

But the settlement of these questions is proper for the final hearing of the cause, after all the issues have been made, and after all the evidence is in.

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JACKSONVILLE, DECEMBER TERM, 1871.

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**THE UNITED STATES VS. BETTILINI**

1. The offenses of effecting an entry, and of aiding and assisting in effecting an entry, of goods, etc., at less than their true weight or measure, by means of false samples or false representations, etc., may be charged conjunctively in the same count of an indictment.
2. An indictment under sec. 8 of the act of March 3, 1863 (12 Stat., 739), charging the defendant with effecting an entry of goods by fraudulent means, must specify what fraudulent means were used, otherwise it is bad.

Heard upon motion to quash the indictment.

*Messrs. J. P. Sanderson and M. D. Papy, for the motion.*

*Mr. H. Bisbee, Jr., U. S. Attorney, contra.*

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The United States vs. Bettilini.

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FRASER, District Judge. The indictment in this case is found for the offense of knowingly effecting an entry of goods contrary to the provisions of the third section of the act of March 3, 1863, entitled "An act to prevent and punish frauds upon the revenue; to provide for the more certain and speedy collection of claims in favor of the United States, and for other purposes" (12 Stat., 739). The said section reads as follows: "If any person shall, by the exhibition of any false sample, or by means of any false representation or device, or by collusion with any officer of the revenue, or otherwise, knowingly effect, or aid in effecting an entry of any goods, wares, or merchandise at less than the true weight or measure thereof, or upon a false classification thereof, as to quality or value, or by the payment of less than the amount of duty legally due thereon, such person shall, upon conviction thereof, be fined in any sum not exceeding five thousand dollars, or be imprisoned not exceeding two years, or both, at the discretion of the court."

The first ground of objection is that every count in the indictment is double, and that the duplicity consists in this, that the prisoner is charged with both knowingly effecting an entry, and knowingly aiding in effecting an entry of the goods at the custom house.

The offense created by the act is a misdemeanor where all are principals. The offense of effecting an entry, and of aiding in effecting an entry, may be committed by different persons, yet they are different stages of the same offense, and may be charged conjunctively in one count against the same person, and the proof of either will sustain the charge. This has been the uniform ruling of this court, and this case is no exception to those already determined.

In this respect the indictment is not defective. *U. S. v. Mills*, 7 Pet., 140; Whart. Crim. Law, sec. 390, and note.

The next objection is that the offense is not set out in the indictment with sufficient certainty; that the facts or circumstances which constitute the definition of the offense in the act are not set forth, and that, therefore, the indictment is bad.

Mr. Chitty, in his Criminal Law, vol. 1, p. 281, says: "It is

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The United States vs. Bettilini.

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a general rule that all indictments upon statutes, especially the most penal, must state all the circumstances which constitute the definition of the offense in the act, so as to bring the defendant precisely within it."

It is argued that this rule is relaxed by the decision of the supreme court in *United States v. Mills*, 7 Peters, cited above, and that, in consequence of that decision, it is not necessary, in practice, to set out in an indictment any circumstances or facts to apprise the accused of the crime with which he is charged. The court say, in that case: "The general rule is, that in indictments for misdemeanors created by statute, it is sufficient to charge the offense in the words of the statute. There is not that technical nicety required as to form, which seems to have been adopted and sanctioned by long practice in cases of felony, and with respect to some crimes, when particular words must be used, and no other words, however synonymous they may seem, can be substituted."

Thus far the court simply say that the pleader need not resort to technical words in describing the offense, but that the words of the statute shall be sufficient. "But that in all cases the offense must be set forth with clearness, and all necessary certainty, to apprise the accused of the crime with which he stands charged."

The supreme court, in this, makes a distinction between the technical words necessary to be used in describing an offense, and the circumstances necessary to show that an offense has been committed. Mr. Chitty makes the same distinction. In his work on Criminal Law, vol 1, p. 283, he says: "It is, in general, necessary not only to set forth on the record all the circumstances which make up the statutable definition of the offense, but also to pursue the precise and technical language in which they are expressed." "The certainty essential to the charge consists of two parts, the matter to be charged, and the manner of charging it. 1 Chitty Cr. Law, 169, 170. The technical niceties, called by Lord HALE unseemly niceties, which were allowed to prevail in the early English cases, were regretted by many eminent and learned judges in England—

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LORD HALE, LORD KENYON, LORD ELLENBOROUGH and LORD MANSFIELD being among the number; but these regrets related to mere formal objections based upon the manner of charging the offense in the use of words, or even in the omission of a letter. Chitty Cr. Law, 170 et seq.; 2 Hale's Pleas of the Crown, 193.

But none of the judges have gone so far as to admit that it would be safe in practice to relax the rule which requires clearness and certainty as to the matter charged. This embraces "a certain description of the crime of which the defendant is accused, and a statement of the facts by which it is constituted, that the accused may know what crime he is called upon to answer; that the jury may be warranted in finding a verdict; and that the court may see such a definite offense upon the record; that the judgment and punishment which the law prescribes may be applied; that the defendant may plead the conviction or acquittal, should he be again called to answer a charge for the same offense; and, I may add, that it may be impossible to convict an innocent person by dispensing with proof of the facts and circumstances which constitute the crime." 1 Chitty Cr. Law, 172.

"Therefore, an indictment charging the defendant with obtaining money by false pretenses, without stating what were the particular pretenses, is insufficient." 1 Chitty Cr. Law, 171. For the defendant must be advised, not only of what he has to answer, but the court must be advised what the pretenses are; for it is not every false pretense which will bring the case within the meaning of the law. *Rex v. Goodhall*, Russell & Ryan, 461; Wharton's Crim. Law, secs. 2086, 2087.

But it is argued on the part of the prosecution that in this country the courts have modified this rule, and dispensed with the degree of certainty formerly required in setting out an offense in an indictment, and that now it is necessary only to charge the offense in the words of the act creating it; that in this case the facts and circumstances could not be set out because unknown to the attorney for the United States; and that this case is governed by rules and principles entirely different

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from a case arising under the law for obtaining goods by false pretenses; that the false representation or device or collusion with an officer of the revenue, or the exhibition of any false sample, is not a material part or element of the offense, and therefore need not be set forth in describing it, and that the words "or otherwise" employed in the statute, so far enlarge the definition of the offense, as to make what precedes them entirely immaterial, and do in effect obliterate it altogether, and bring within the meaning of the act any entry made by the payment of less than the amount of duty legally due thereon, though such entry was made through ignorance or mistake, and with no intention to defraud the revenue.

To sustain this view, the attorney for the United States adduces a decision of the district court of the United States, for the eastern district of Michigan, in a case arising under the same act of congress and the same section of the act, as the case here under consideration. Int. Rev. Rec., vol. 13, pp. 195-6.

Before referring to this decision it may be well to dispose of some of the positions asserted in the argument as just stated.

It is clear that the supreme court in the case of the *United States v. Mills*, above cited, and which is relied upon to sustain the position that certainty and particularity are no longer necessary in charging the matter of the offense, does not sustain that position, but quite the contrary, as has been shown above; that it changed in no respect the rule laid down by Chitty, as the exponent of the most learned, wise and just tribunals of England, making a distinction between formal and technical niceties in words, and the statement of substantial matters — and that is certainly substantial matter which is descriptive of the offense, and which must be proved as laid — and nothing can be proved to sustain the indictment which is not charged therein.

The reason given for not having set out the circumstances of the offense, that it was impossible because they could not be known, is untenable, because the grand jury could find no bill without proof of such facts, and they must be within the knowledge of the prosecuting officer before he can conclude that such

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offense has been committed, and before he will consent to lay a bill before the grand jury, unless the position be true that the words "or otherwise," in the statute, must be construed to create an offense under the act, in which there is neither intent nor ingredient of fraud. If such be the correct construction of those words, then the indictment need not charge that the entry was effected by false sample, false representation or device, or by collusion, but simply that the entry was effected at less than the true weight or measure thereof, for that would be otherwise than by false representation or device. But the rule that effect must be given to all the words of an act, and that none of the provisions of an act must fail unless so repugnant that they cannot be reconciled, must not be overlooked. Congress surely meant something by the words, "by the exhibition of any false sample, or by means of any false representation or device, or by collusion with any officer of the revenue;" and also meant something by the words "or otherwise." Congress intended to make any fraudulent means, whether by sample, representation, device, collusion or otherwise, an ingredient of the offense; and if the fraudulent entry were effected by any other means than by false sample, false representation or device, or collusion with an officer of the revenue, such fraudulent means would be included in the words "or otherwise" in the act. There is no other reasonable construction by which all the provisions of the act can stand together. The words, "or otherwise," must be interpreted to mean, or by any other fraudulent means whatsoever, or they mean nothing and are mere surplusage. The construction which gives them effect, and does not destroy the effect of the other provisions of this section of the act, is clearly correct. The means used in effecting the entry is made by the act the very gist of the offense, and without which no offense can be committed, and if so, the means by which it was effected must be set out and clearly stated in the indictment. Such facts and circumstances as will show that a false sample was exhibited, in what false and to whom exhibited, what false representations were made, and to whom, what false device was used and how, with what officer of the revenue the collusion

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was had, or how or by what other fraudulent means, if any, the entry was effected. It is admitted by the learned judge, in the case of the *United States v. Ballard, supra*, that the means adopted to commit the offense would inevitably constitute one of its elements, but for the concluding clause, "or otherwise," that "these words render that unlimited and general, which by the preceding clauses, without these words, would be limited and specific," and that that clause does not, like what precedes it, relate simply to the means by which the offense is committed, but also to the manner in which the entry is made, and that, therefore, "the facts answering to the preliminary clauses of the section may or may not be alleged in the indictment at the option of the pleader;" and as a consequence, if not alleged, they need none of them to be proved in order to convict the defendant. With this view I cannot agree, as it would seem entirely to change the rule above stated for the construction of statutes, and introduce into the criminal practice a laxity and uncertainty always carefully avoided by the purest and wisest tribunals in the administration of criminal justice.

It is evident, by reference to and comparison of some of the decisions of the ablest judges both in England and this country, that the rule as to certainty of the matter charged has not been changed or modified. *R. v. Holland*, 5 Term R., 623; *Com. v. McAtee*, 8 Dana (Ky.), 29; *People v. Taylor*, 8 Denio, 91; *Biggs v. The People*, 8 Barb., 547. All the counts in the indictment, which profess to charge an offense to have been committed under the section and act above referred to are defective in not having set out the circumstances required, as I have shown above. And this is in accordance with the ruling of this court in the cases of the *United States v. Conant*, and has been the uniform ruling in all similar cases. Upon a thorough reexamination of the authorities, I see no reason for changing or reversing those decisions or for adopting a different rule. Other defects have been pointed out in this indictment, but I do not deem it necessary to examine it further, as the question discussed disposes of the case. The indictment must be quashed.

Davis et al., Trustees, vs. The Railroad Company et al.

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JACKSONVILLE, AT CHAMBERS, MAY, 1873.

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DAVIS et al., Trustees, vs. THE RAILROAD COMPANY et al.

1. A receiver in possession of mortgaged premises under order of a state court of chancery, in proceedings for foreclosure, prior to commencement of proceedings in bankruptcy, cannot be dispossessed by order of the district court in the bankruptcy proceedings.
2. Such possession is a lawful one under a specific and vested lien, and can only be interfered with by the assignee in bankruptcy by payment and redemption of the mortgage.
3. To deprive a man of his just possession under a specific lien would often involve a sacrifice of his rights.
4. A sale made by an assignee in bankruptcy of property thus unlawfully taken from a receiver (due notice being given of the illegality at the time of the sale), will be set aside, and the purchase money will be ordered to be returned.
5. A contumacious resignation by officers of a company can not prevent the company from filing a petition in bankruptcy, if a majority of shareholders authorize it to be done.
6. The district court having necessarily passed upon the question of the authority of the officers to file the petition in bankruptcy, it cannot be disputed in a collateral proceeding.

On the 1st of June, 1867, Davis and Jandon, trustees of the first mortgage of the Alabama & Florida Railroad Company, filed a bill to foreclose the same in the Escambia county court, of the state of Florida, which court on the 11th of July following, appointed Bushnell receiver, who took possession of the railroad and property mortgaged. Afterwards, on the 13th of July, 1867, the railroad company, by its officers, filed a petition in bankruptcy and was declared bankrupt by the district court of the United States for the northern district of Florida, and Hall was appointed assignee in December. The district court, on application of the assignee, ordered the mortgaged property to be taken out of the hands of the said receiver, and delivered to the assignee, which was done by the marshal of

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the United States, against the protest of the receiver. Afterwards, in February, 1868, the same court ordered the property to be sold as perishable property. The sale took place on the 25th of March, 1868, the trustees of the mortgage giving public notice that they claimed the proceedings to be illegal. William A. Richardson and others became the purchasers, and became organized under the name of the Pensacola & Louisville Railroad Company.

The trustees and their receiver then filed this petition for a revision of the proceedings of the district court, and for setting aside the sale. The hearing was postponed from time to time by arrangement, and finally on the 24th of April, 1871, Circuit Justice BRADLEY made a decree, declaring:

First. That the mortgage was a first lien on the property and franchises described therein, and that the possession of the receiver under the order of Escambia county court was a lawful possession at and before the commencement of proceedings in bankruptcy, of which it was not competent for the district court in bankruptcy to deprive him.

Second. That the order requiring the receiver to surrender the property be set aside.

Third. That the question whether the sale in bankruptcy should be set aside and what title, if any, the respondents acquired thereby, be reserved for further consideration; and the assignee was restrained from collecting the balance of the purchase money.

This decree was made without prejudice to any equitable claim which the Pensacola & Louisville Railroad Company might have for reconstructing and furnishing the railroad, and without prejudice to the claim of the trustees for mesne profits.

The reserved questions were subsequently (in November, 1872) argued by *Messrs. Clarkson N. Potter* and *C. C. Yonge*, for the petitioners, and by *Mr. A. G. Thurman*, of Ohio, for the respondents.

The petitioners, amongst other things, insisted that the proceedings in bankruptcy were a nullity, because no officer of the company had been duly authorized by a vote of the majority

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of the corporators present at a legal meeting called for that purpose, to present any petition for adjudication of bankruptcy. The facts bearing on this point are stated in the opinion.

On the 21st of May, 1873, the following opinion was delivered.

BRADLEY, Circuit Justice. The questions now to be disposed of are, first, whether the sale of the property made by the assignee was valid notwithstanding the illegality of the order under which he acted; and second, what should be done with the proceeds of said sale.

The petitioners contend that the sale was void for two principal reasons: first, because the bankruptcy proceedings were void in their inception; and second, because the district court had no authority to take the property out of the hands of the receiver appointed by the state court.

The first ground is based on the allegation that "no officer of the (bankrupt) company had been duly authorized by a vote of a majority of the corporators present at any legal meeting called for the purpose, to present any petition praying for such adjudication, as required by the bankrupt act." I do not attach any importance to the objection of the respondents that this question cannot be raised, because not passed upon by the district court. It seems to me that the district court could not make a decree of bankruptcy without passing upon it. It lay at the foundation of the proceedings, and the decision of the district court on the point cannot properly be brought in question collaterally. However, having looked at the evidence in the case, I cannot see any good ground for the position. If any irregularity occurred in the call for the stockholders meeting, by which the direction was given to institute the proceedings, it arose from the contumacy of certain directors who resigned their offices for the purpose of embarrassing the stockholders. The city of Pensacola owned more than five-sevenths of the stock of the company, and it is sufficiently clear that the city authorities took all practicable measures for having a fair stockholders' meeting and vote on the subject; and that the vote of the city was positive in favor of the bankruptcy pro-

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ceedings, and of the instruction to the president of the railroad company to institute the same. I shall, therefore, assume that the proceedings in bankruptcy were regularly instituted.

The question then recurs, What authority had the bankrupt court to take the property in question out of the possession of the receiver appointed by the state court? The former order in this case, declaring the possession of the receiver lawful, and directing the property to be returned to him, was based on the fundamental principle, that no proceeding in bankruptcy can deprive creditors of their just possession of property held as security for a debt, without discharging the debt. The possession of the receiver, under authority of the state court in virtue of the first mortgage, was the possession of the mortgagees, and could not be interfered with without liquidating the debt. This point has been recently decided by the supreme court of the United States, in the case of *Marshall v. Knox*, 16 Wall., 551. The respondents insist that by the law of Florida, a mortgagee cannot take possession of the mortgaged premises until he has foreclosed the mortgage, and become the purchaser. Whilst this may be the general law of that state, so far as regards the legal right of entry, and the maintaining of ejectment on the mortgage alone; yet, a court of equity, after proceedings have been instituted for the foreclosure of the mortgage, has an undoubted right to take possession of the premises for the preservation of the fund and the protection of the lien thereon. Besides which, the express covenants' and stipulations in the mortgage given in this case authorize the trustees to take possession or to have a receiver appointed within a certain time after default shall be made in the payment of interest or principal.

The rights which supervene upon a mortgage or other specific lien, accompanied with possession before proceedings in bankruptcy, are very different from those arising from proceedings in state courts in cases of general insolvency. A mere insolvent proceeding, or a proceeding of that nature, and possession of the bankrupt property taken in pursuance thereof is antagonistical and repugnant to the bankrupt law,

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and will be avoided by regular proceedings in bankruptcy. But a proceeding to enforce a mortgage or other specific lien involves the right of property, and possession in pursuance thereof, legally or judicially, taken before proceedings in bankruptcy, cannot be interrupted by those proceedings. Hence, the action of the bankrupt court, in taking the property in question out of the hands of the receiver, was regarded as unwarranted and illegal.

But the respondents' assignee contended that the sale should stand, although the order for sale was illegal. I do not think so in such a case as this. It is analogous to that of a sale by a sheriff on execution against A., of property belonging to B. The sale is void. The owner may recover his property of the purchaser. So may the trustees in this case. They ought not to be compelled to take the proceeds arising from the unlawful sale. Their rights might, in this way, be wholly sacrificed.

The respondents, however, insist that no motion was made before the district court to set aside the sale by the assignee, and, therefore, the matter cannot be considered on this petition. But the sale was made in consequence of a special order of the district court, and that order is brought directly in question. Satisfied that the order, and the sale made in pursuance of it, were both illegal, I can see no difficulty in decreeing them both to be void.

The question then arises as to the disposition to be made of the purchase money paid or secured to be paid by the respondents. The purchasers insist, that it should be returned; the assignee, that it should be retained by him for the benefit of the general creditors.

From an examination of the evidence, it seems clear that the assignee assumed to sell the property clear of the mortgage. He did not profess to sell the mere equity of redemption. The respondents in their answer claim that the sale was made free from the lien of the mortgage. They claim that the mortgage was void. And whilst it is true, that the petitioners gave notice at the time of the sale, that it would be subject to their lien, the assignee and the purchasers did not act on this view.

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The latter never intended to purchase subject to the lien, but clear of the lien.

Had the receiver sold the property subject to the lien of the first mortgage, the amount bid for it by the respondents would have been payable by them, and would have been a proper asset of the bankrupt company's estate. But as they did not sell it in that manner, but sold it as unincumbered property, so far as the first mortgage was concerned, and as that was a clear mistake, since the first mortgage was a valid lien and absorbed the entire property, the sale ought to be held invalid, and the proceeds of the sale ought to be returned to the purchasers. This is clearly the justice of the case, and in my judgment the law is not contrary thereto.

There ought to be a decree, therefore, setting aside the sale made by the assignee in bankruptcy, and directing a return of the purchase money to the purchasers. This decree should include all sales of property covered by the first mortgage, and in the actual or constructive possession of the receiver appointed by the court of Escambia county. Other sales, if any there were, are not subject to question in this proceeding. The proceeds belong to the estate of the bankrupt corporation.

As the purchasers had notice of the first mortgage, and knew that the holders thereof intended to assert their rights, the costs and expenses of the assignee and others, in reference to the custody and sale of the property, should be deducted from the purchase money to be returned.

Let a decree be framed in accordance with these views.

# SOUTHERN DISTRICT OF MISSISSIPPI.

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MAY TERM, 1872.

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JONES et al. VS. BRITTAN et al.

1. When a cause in equity is submitted for final decree upon the pleadings and evidence, and it turns out that no replication has been filed to the answers, but that the evidence has been taken as if it had been filed, the court will try the case on its merits, notwithstanding the want of replication, or allow one to be filed instanter.
2. A decree in equity will not be declared void for fraud because there may be suspicious circumstances connected with its rendition. Fraud will not be presumed. It must be satisfactorily shown.
3. When a case has been submitted to and passed upon by a court having jurisdiction, its decree cannot be collaterally impeached, except for fraud.
4. A deed, absolute on its face, will not be held to be a mortgage unless the grantee, as well as grantor, understood the purpose of the conveyance to be the security of a debt.
5. If, after objection is made to a bill in equity for want of necessary parties, the complainant neglects or refuses to bring them before the court, the bill will be dismissed.

This was a cause in equity, appealed from the district court. It was submitted for final decree on pleadings and evidence.

*Messrs. Wiley P. Harris and James Yerger*, for complainants.  
*Mr. John D. Freeman*, for defendants.

WOODS, Circuit Judge. The bill is in the nature of a creditor's bill. It avers, in substance, that complainant Jones, on December 17, 1866, recovered a judgment against the firm of Coleman, Brittan & Withers, in which the defendant Brittan was a partner, for \$11,883.25, in the first district court for Hinds county, Mississippi. That the firm of John Watt & Co., of which complainant, Michael Musson, is surviving partner, recovered a judgment against the same firm of Coleman, Brit-

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Jones et al. vs. Brittan et al.

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tan & Co. on the law side of this court, on the 9th day of May, 1867, for the sum of \$7,200. That executions were taken out on these judgments and were returned *nulla bona*, and that the judgments remained unsatisfied. That, notwithstanding the return on the executions, William J. Brittan was, at the rendition of the judgments and still is, seized and possessed of a valuable plantation in Issaquena county, which is subject to the lien of the judgments, and ought to be subjected to the payment of the same.

That the firm of Coleman, Brittan & Co., at the date of the judgments, and for a considerable time prior thereto, was insolvent, and the defendant, William J. Brittan, being a member of the firm and knowing its insolvent condition, for the purpose of preventing the application of his individual property to the payment of the debts of the firm, procured a suit to be instituted against himself by his wife, the defendant Fannie A. Brittan, in the chancery court of Hinds county, in which she claimed that her husband was indebted to her in the sum of \$20,625.86, for cotton, which she claimed was grown on her plantation between September 8, 1860, and April 4, 1861, and was shipped to the firm of Coleman, Brittan & Co., and by them sold, and that the same never was accounted for to her by her husband William J. Brittan.

That the bill in the chancery court of Hinds county, and the answer of Wm. J. Brittan were filed on the same day, to-wit, on May 14, 1866, and the answer which admitted all the allegations of the bill was sworn to two days before it and the bill were filed. That on the 6th of June following, a decree was rendered as prayed in the bill against Wm. J. Brittan, for \$27,023.81, on which execution was allowed to issue. That this proceeding was instituted solely upon the instigation and procurement of Wm. J. Brittan, and was not instituted by his wife, Fannie A. That the solicitor who drew the bill drew the answer, and was employed solely by Wm. J. Brittan, and not by his wife. That Brittan did not reside at the time of said suit in Hinds county, Mississippi, but in New Orleans, and that his object in having

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Jones et al. vs. Brittan et al.

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said suit brought in said county and remote from the city of New Orleans, where his creditors mainly resided, was to avoid scrutiny.

That said proceedings were for the purpose of hindering, delaying and defrauding the complainants, and giving Fannie A. Brittan an unfair and inequitable advantage. That the alleged debt, upon which said decree was founded, was invalid and fraudulent, and the decree was procured by collusion between the said parties to the same. That said Wm. J. Brittan caused an execution to be issued on the same and levied on his plantation, in the county of Issequena, containing 1,200 acres, and the same was sold by the sheriff and conveyed to his wife, Fannie A. Brittan. That since the rendition of the judgments above mentioned, Wm. J. Brittan has been adjudicated a bankrupt, but has not surrendered the lands so sold to Fannie A. Brittan, as part of his assets.

Complainants claim their judgments to be liens on said lands, and pray that they may be declared assets of said bankrupt, and the judgments of complainants a lien thereon, and that the same may be sold and the proceeds applied to the payment of complainants' judgments, and the residue, if any, distributed according to justice and equity.

Wm. J. Brittan and Fannie A. Brittan have filed separate answers under oath, in which they deny *seriatim* all charges of fraud, fraudulent practices or collusion, and deny the invalidity or fraudulent character of the claim on which the decree in favor of said Fannie A. Brittan was based, and aver the entire *bona fides* of the proceedings in chancery and the validity and honesty of the debt on which they were founded, and the solvency of Coleman, Brittan & Co.

The answers are responsive to all the material allegations of the bill, and put the complainants upon proof thereof. To these answers the complainants have filed no replication. The defendants would therefore strictly be entitled to have the bill dismissed as a matter of course. See Equity Rule No. 66. But as both parties have proceeded to the taking of testimony as if the general replication had been filed, and no motion has

been made to dismiss the bill for want of replication, it may be considered as filed, and the case considered on its merits, or a replication may be filed instanter.

After looking into the evidence, I am satisfied that the complainants have failed to make good their bill by their proof.

The complainants have offered as testimony :

1. The records of their judgments against Coleman, Brittan & Co.

2. The record in the case of *Fannie A. Brittan v. Wm. J. Brittan*, in the chancery court of Hinds county.

3. The record of the proceedings in bankruptcy *in re Wm. J. Brittan*, showing that he did not surrender said plantation as one of his assets, and there rested their case.

This proof utterly fails to establish the charges of fraud and fraudulent practices and collusion made in the bill. In fact it does not tend to establish the charges of the bill. Fraud is never presumed. It must be affirmatively shown. If upon this proof we are asked to decree for complainants, we must presume that the decree in favor of *Fannie A. Brittan v. Wm. J. Brittan* was fraudulent and therefore void and without any proof save the mere record itself. The record does not establish the fraud.

Unless, therefore, the defendants have supplied by their testimony the want of proof on the part of complainants, the case must fail.

As the answers of defendants are under oath, they are, so far as responsive to the bill, evidence in the case, and to entitle the complainants to a decree, must be overcome by the oaths of at least two witnesses, or one witness and strong corroborating circumstances.

We have seen that the evidence introduced by the complainant does not, standing alone, tend to overcome the answers of defendants. The testimony of defendants so far from proving the case made in the bill tends to support the answers.

It appears from the testimony that the plantation which is sought to be subjected to the payment of the complainants' judgments, was bought by Wm. J. Brittan in the year 1852,

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and paid for out of the proceeds of his wife's separate estate, and the deed inadvertently made to Wm. J. Brittan, without the knowledge or consent of his wife.

In the year 1860, there was produced on another plantation, the separate property of Mrs. Brittan and by the labor of her own slaves, a crop of 540 bales of cotton which was during the winter and spring of 1861 shipped to the firm of Coleman, Brittan & Co., in New Orleans and by them sold from time to time, the last sale being made on April 4, 1861, and the aggregate amount of the sales being \$20,628.86.

The law of the state provides (Revised Code of Miss., 1857, p. 336, art. 24) that "the rents, issues, profits, products and income of either real and personal estate, or both, owned by any married woman at the time of her marriage or which may have accrued to her afterwards shall also enure to the wife as her separate property, and shall not be liable to be taken in satisfaction of the debts of her husband."

So that the proceeds of the 540 bales of cotton was the property of Mrs. Brittan, and she had a claim on her husband therefor if he appropriated the same, unless she lost her right thereto by her own act or neglect. Art. 28, Revised Code, p. 237, provides, that "neither the husband nor his representatives shall be liable to account to the wife for the rents, profits or income arising from the separate property of the wife after the expiration of one year from the time of receiving the same." The evidence shows that the proceeds of the 560 bales of cotton were passed to the credit of Wm. J. Brittan on the books of Brittan, Coleman & Co., but precisely when this was done does not appear, but there is no proof that it was done prior to July 1, 1861. Within one year from the time of such appropriation Mrs. Brittan might claim said proceeds from her husband. It is claimed by complainants that as Mrs. Brittan did not assert her right to the proceeds of the cotton as against her husband until the 16th of May, 1866, she lost her right thereto, and her husband ceased to be liable to her on account thereof.

The facts in the case were fairly submitted to the chancery court of Hinds county, in the case of *Fannie A. Brittan v.*

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*Wm. J. Brittan*, and upon the facts the court decreed in favor of Mrs. Brittan. This is conclusive unless it is shown that by fraud and collusion between the parties the court was misled as to the true state of facts, and rendered a decree which it would not otherwise have made. No attempt is made to prove any such fraudulent practice. That court was possessed of the facts in the case just as they appear to the court here, and upon the facts it made its decree. There was no fraud, concealment or misrepresentation, and the decree of that court must stand. It is not enough to show that the court erred. The decree cannot be attacked in this collateral proceeding unless for fraud.

But did the court err? Although we are not advised by the pleading or proof of the precise date when Brittan appropriated the proceeds of his wife's cotton by a credit therefor on the books of the firm, I cannot by the proof fix the date prior to the 1st of July, 1861. On the 5th of August, 1861, the courts of Mississippi were by the act of the legislature closed against the prosecution of such claims. Up to that date, four months and one day of the one year's limitation had elapsed, and it is not averred or shown that before the commencement of her suit in equity against her husband by Mrs. Brittan, the courts of the state had been open long enough to complete the bar of one year. The period during which the courts are closed is not to be counted in estimating the time when the bar of the statute intervenes. *Hunger v. Abbott*, 6 Wall., 532. So even if we were authorized, which we are not, to take note in this collateral proceeding of any error into which the chancery court of Hinds county may have fallen, it is not made to appear that the court fell into any error.

The decree of that court was based upon what had once been a valid and just claim in favor of Mrs. Brittan against her husband, and the court, with all the facts before it, decided that the claim was still a valid and subsisting one. Its decree is, therefore, binding upon all persons until reversed in a direct proceeding, and cannot be here collaterally impeached except for fraud, and no fraud is shown.

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But even if the decree of the chancery court of Hinds county, and the proceedings and sale under it were void, the record in this case discloses an insuperable obstacle to the decree asked for by complainants.

It appears in the evidence that, on the 1st of November, 1865, William J. and Fannie A. Brittan, by a deed absolute on its face, and for a sufficient and valuable consideration, conveyed the plantation in controversy to Mrs. M. L. Johnson, the mother of Mrs. Brittan. The answer of William J. Brittan contains an expression which would indicate that this deed, though purporting to be absolute, was intended as a mortgage.

In his deposition, however, Brittan says that the conveyance was not intended as a mere security, but as payment of a debt due by him to Mrs. Johnson; but, from the uniform kindness of Mrs. Johnson to her children, witness and his wife inferred a willingness on her part to accept of the money due at any time before she otherwise disposed of the plantation.

Mrs. Johnson, the grantee, testifies that the conveyance to her "was intended as an absolute deed without the privilege of redemption." The deed being absolute on its face, unless the grantee understood and agreed that it should be a security for the debt, it must be held to be an absolute deed.

It is clear that it was not so understood by both parties. Mrs. Johnson has then the legal title to the plantation in question, and the proof shows she is in possession. She is, therefore, a necessary party to the bill of complaint in this case. These facts were all brought out before the trial of the case in the court below. The complainants have neglected to make Mrs. Johnson a party. The objection was taken upon the hearing in this court. The rule upon this subject is as follows: If, after objection is made for want of necessary parties, the plaintiff neglects or refuses to bring them before the court, the bill will be dismissed. *Singleton v. Gayle*, 8 Porter, 270; *Bailey v. Myrick*, 36 Me., 50, 54; *Huston v. McClarty*, 3 Litt., 274; *Royce v. Tarrant*, 6 J. J. Marsh., 567; *Van Epps v. Van Dusen*, 4 Paige, 64.

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Holloman vs. The Life Insurance Company.

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So I am of opinion that the bill should be dismissed, at complainants' costs,

1. Because the averments of the bill are not sustained by the proof; and

2. Because the necessary parties are not before the court.

Decree accordingly.

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MAY TERM, 1874

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HOLLOMAN VS. THE LIFE INSURANCE COMPANY.

1. The certificate of the examining physician of a life insurance company is evidence of its recitals, and is conclusive unless the opinion of the physician was influenced by fraudulent representations or concealment of material facts.
2. An insurance company is not permitted to prove that the examining physician was incompetent; he was the agent of the insurer and not of the insured.
3. A declaration that the insured had not previously had a severe disease, *held*, not to include the ordinary diseases of the country which yield readily to medical treatment, and do not tend to shorten life.
4. A misrepresentation to avoid the policy must have been in relation to a material fact that would have probably induced the insurer to decline the risk.
5. The insured had, for a period of three months, about three years previous to the contract of insurance, disease of the bowels, having been perfectly healthy during the interval; this fact was not communicated to the insurers; the insured died about three years after the policy was issued, of a disease of an entirely different character: *Held*, that the previous sickness was not material, and the fact that it was not communicated would not avoid the policy.

Submitted to the court on the issues of fact as well as of law.

The opinion of the court contains a sufficient statement of the facts.

*Messrs. Adam & Speed*, for plaintiff.

*Messrs. Harris & Harris*, for defendant.

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Holloman vs. The Life Insurance Company.

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HILL, District Judge. This is an action of debt, commenced originally by attachment in the circuit court of Warren county, and removed to this court. It is brought to recover the sum of ten thousand dollars, alleged to be due on two policies of insurance, the one issued April 1, 1869, and the other April 1, 1870, for \$5,000 each, on the life of Mrs. Rebecca A. Holloman, wife of the plaintiff, and for his use.

A jury having been waived, and the questions of fact as well as law having been submitted to the court, they will be considered as presented by the pleadings and proof. There is no question raised as to the issuance of the policies, the payment of the premiums, or the death of Mrs. Holloman, or the liability of the defendant, unless the policies are avoided by reason of the fraud alleged in the pleas, which applies equally to both policies.

The pleas all being affirmative, and the allegations therein being denied by the replications, the burden of proving the defense is thrown upon the defendant.

The defense set up by defendant in the pleas is in substance as follows:

That the policies were issued upon conditions therein expressed, among which was this, that if any of the declarations made in the application for the policies, and upon the faith of which they were issued, shall be found to be untrue in any respect, said policies shall be deemed and held null and void.

That among other declarations so made, it was declared said Rebecca A. Holloman was not consumptive on the days when made, to wit, on the 25th of February, 1869, and the 25th of March, 1870, and had not previous thereto had consumption, or habitual cough, and had not for some years previous thereto had any severe sickness or disease, and was not then, or had not before that time been affected with any disease or disorder; nor had the parents of said Rebecca A. Holloman been afflicted with any scrofulous or other constitutional disease, hereditary in character.

That said declarations were untrue in this, that the health of said Rebecca A. Holloman was not good; that she had pre-

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Holloman vs. The Life Insurance Company.

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viously had consumption and habitual cough, and she had within the seven years preceding, and did then have, severe sickness and disease; and was then afflicted with disease of the womb of a severe and dangerous character, by means whereof the life of the said Rebecca was destroyed, and that the father of said Rebecca had scrofula, a disease constitutional and hereditary in its character, and which false and fraudulent declarations were made to deceive and did deceive defendant, and induced the issuance of said policies, whereby they became null void.

The evidence produced to establish the declarations so made are the answers made by the plaintiff to certain questions propounded to him as the basis of the contract.

To the 8th question, "What is the present state of the health of the party?" the answer is, "good."

To the 14th question, "Has the party ever had any of the following diseases?" (among which is *consumption*) the answer is "No."

To the 19th question, "Has the party had during the last seven years any severe sickness or disease? if so, state the particulars, the name of the attending physician, or who was consulted and prescribed;" the answer is "No."

The declarations made by this proof, necessary to be considered, are:

1. That Mrs. Holloman was then in good health.
2. That she had not had consumption, cough, scrofula or other hereditary disease.
3. That she had not within the preceding seven years been afflicted with any severe sickness or disease.

The first and third only of these declarations need be considered, as there is no proof to show, or tending to show that the remaining statement was untruthfully made.

The first question of fact to be ascertained from the proof is, Was Mrs. Holloman in good health at the time these declarations were made?

The defendant, to establish the allegation that she was not, has read the depositions of a large number of witnesses em-

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Holloman vs. The Life Insurance Company.

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bracing the neighbors and acquaintances of the deceased ; some of the former servants of the deceased, and the nurse who attended her in her late sickness.

I have carefully examined this testimony, and I find that the depositions, with the exception of three or four, fail to show that Mrs. Holloman's health was not good, at the times when the declarations were made and the policies issued. And as to the testimony of those who testify as to her ill health prior to the six months next preceding her death, it is evident they are mistaken as to the time, other than the attack while at Sharon in 1867 ; three of these witnesses testify that the death occurred in 1872, showing a want of memory which greatly weakens the weight to be given to their testimony. It is proved by Dr. McKie, that at a time when one witness states that the deceased was sick and using disinfectants in April, 1870, she was in fact in good health and at Sharon nursing her sick son. Besides, in addition to this rebutting testimony, a number of her relations and intimate friends testify that she was a healthy woman up to her last sickness, except an occasional attack of such malarious diseases as are common in that neighborhood. The physicians in the vicinity testify the same thing ; so that aside from the testimony of Dr. Tuttle, who was the medical examiner for the first policy, and Dr. Jones for the last, the certificates of these physicians to the company upon such examination must be held as competent evidence of the facts certified to, and can only be rebutted by testimony establishing that they were deceived either by false statements or by the suppression of facts, without a knowledge of which such examining physicians could not come to a correct conclusion as to the condition of the party examined, and which could not be discovered by them upon the usual examination. The defendant must be estopped from denying the competency of the physician selected to make the examination, the physician being the agent of the defendant, and not the agent of the plaintiff. These certificates show Mrs. Holloman to have been in good health when these declarations were made ; and as to the declarations made for the first policy, the good health of Mrs.

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Holloman is established by the testimony of Dr. Tuttle, taken upon both the examination of the plaintiff and cross-examination of defendant.

The examination made by Dr. Jones on the 25th of March, 1870, for the last policy, states that Mrs. Holloman was then in good health. Dr. Jones was the family physician of plaintiff, as well as the examining physician of defendant, but his deposition could not be taken in consequence of the recent deprivation of his mental faculties. In confirmation of the correctness of his conclusions, Dr. McKie states, that in April (and it must have been at that time or shortly thereafter), the insured was in Sharon nursing her sick son for more than ten days, and was apparently healthy. In view of all the proof it cannot be otherwise held than that the allegation that Mrs. Holloman's health was not good, at the time these declarations were made, is not sustained by the proof.

The last question of fact to be considered is, Had Mrs. Holloman, during the seven years next preceding the time when these declarations were made, been afflicted with any severe sickness or disease? This does not include the ordinary diseases of the country, which yield readily to medical treatment, and when ended leave no permanent injury to the physical system, but refers to those severe attacks which often leave a permanent injury and tend to shorten life. The only proof tending to establish this allegation, not already considered is, that of her sickness while residing at Sharon in 1867. Dr. O'Leary, the physician who attended her, testifies, that soon after she came there he was called to prescribe for her; that her disease was chronic diarrhea or affection of the bowels, and he thinks he prescribed for her for two or more months, when she recovered.

He states, that if it lasted only a few weeks it could not be called chronic. The testimony of the eminent medical men, who have been examined, leaves it uncertain as to what may be considered a chronic disease of the bowels, the causes being so various. As already stated, the common understanding of the question, as to whether the party has had, during the seven

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years, any serious disease, is whether it was such disease as often impairs the constitution and tends to shorten life, and which, if known, would have deterred the insurer from taking the risk without further examination and information. Testing the question propounded and the answer given by this rule, it is evident that had the answer been, that Mrs. Holloman had in 1867 (two years before the first and three years before the last answer) this affection of the bowels which entirely ceased within two or three months, and had not recurred, there would not have been the least hesitancy about taking the risk; such being the case, it must be held, that the last averment is not sustained by the proof.

Insurance companies, like all other parties, are entitled to the benefit of these contracts, and to be relieved from them when procured by misrepresentation and fraud, and are entitled to have their rights declared and enforced in courts of justice as those of individuals; but like individuals, are bound by the acts of their agents, and a knowledge of facts communicated to their agents is full notice to them.

The testimony in the case shows, that Mrs. Holloman died of a disease to which females are subject, and more liable to at a certain age than any other. She had resided all her life in a malarious district; all these facts were well known to the agent and physician selected, and instructed by the defendant, and consequently known to the defendant, who assumed all the risks incident thereto.

The consideration upon which the contract is based, on the one side, is the reception of the premiums, and on the other, the payment of the policy when the death shall occur; the amount of premiums being regulated by the probabilities of the duration of life, and consequently of the amount of premiums to be paid.

The false statement of facts, or the suppression of facts, to have the effect of forfeiting the claims of the insured and rendering the contract void, must be of so material a character, that if not made on the one hand, or if made on the other, they would

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**Didlake vs. Robb.**

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probably have induced the insurer to decline the risk, or to materially modify its terms.

The questions propounded must be such as can be reasonably comprehended by the answerer.

The same rules must be applied to this contract which are applied to others, to ascertain the mutual understanding of the parties, and when these rules are applied to the evidence in this case, it must be held, that the defenses insisted upon are not sustained, although the agent and counsel of the defendant have certainly bestowed an unusual amount of labor, and displayed great ability in preparing and presenting the defense.

The plaintiff is, therefore, entitled to a judgment for the sum of ten thousand dollars, the amount of the two policies, and to the further sum of seven hundred and fifty dollars, interest thereon for one year and three months, making the sum of ten thousand seven hundred and fifty dollars.

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**NOVEMBER TERM, 1874.**

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**DIDLAKE VS. ROBB.**

1. A promissory note given by the heir, in renewal of a note made by his ancestor which was barred by limitation at the death of the ancestor, is void for want of consideration.
2. At common law, after the lapse of sixteen years, there arises the legal presumption that the debt has been paid; and, after the expiration of twenty years, this presumption becomes conclusive.

The legal questions in the case were presented by a demurrer to one of the defendant's pleas. The substance of the plea is stated in the opinion of the court.

*Messrs. Johnson & Johnson*, for plaintiff.

*Messrs. Nugent & Yerger*, for defendants.

HILL, District Judge. This action is brought by the plaintiff.

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Didlake vs. Robb.

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iff against the defendants to recover the amount of five promissory notes, each for the sum of \$3,189.27, due and payable as follows: February 1, 1868, 1869, 1870, 1871 and 1872, and each bearing interest from the first day of February, 1867, the day upon which, it is to be presumed, they were executed, no date being stated. Among other pleas interposed by the defendants is one stated as the second, which avers a want of a sufficient consideration, alleging that the notes were given in renewal of four notes executed by John H. Robb, the late husband of said Ann L. Robb, and the father of the other defendants, payable to the ancestor of said Nannie W. Didlake, dated September 12, 1839, and due and payable as follows: one for \$2,613, February 1, 1843; one for \$2,474, February 1, 1842; one for \$2,383, February 1, 1841; and one for \$500, dated September 24, 1849, and due four months after date. On all these notes there were credits, except the last mentioned.

John H. Robb, the ancestor of defendants, died intestate in the year 1852, and letters of administration were granted upon his estate, by the probate court of Washington county, in May, 1853.

All of these notes, except the note for \$500, upon which \$300 had been paid in 1850, were barred by the statute of limitations before the death of the said John H. Robb; and all of them were barred long before the execution of the notes sued upon. It is also averred that these notes were executed under a mistake as to their binding obligation upon the estate of the said John H. Robb. To this plea the plaintiffs have filed their demurrer, which raises the question as to whether the matters alleged in the plea constitute a good defense to the plaintiff's action.

It is admitted that there must have been a sufficient legal consideration upon which the promises were made, to enable the plaintiff to recover; that is, some benefit to the promisor, or some injury to the promisee; but, it is insisted by plaintiff's counsel, that the giving up of the old notes was a satisfaction of them, and hence a good consideration.

The authorities hold that where a party has owed a valid

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Didlake vs. Robb.

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debt which has become barred by the statute of limitations, or from which he has been discharged by a decree in bankruptcy, a new promise to pay the debt will be binding, both defenses being personal and only available upon plea; but in such cases the debt from which the promisor may upon his plea discharge himself must once have been a valid one and one for which he would have been liable but for the plea; otherwise, the promise is entirely voluntary and of no binding force.

The heirs at law and distributees are not liable to pay the debt of the ancestor, whilst the estate, both real and personal, is liable if proceeded against in the proper manner, and within the prescribed time. This the holders of these notes executed by the ancestor neglected to do until this liability was extinguished by lapse of time and the statute of limitations. It is now well settled in this state that a debt barred by limitation at the death of the decedent cannot be revived by a promise made by his personal representative, and upon principle, a judgment rendered against the representative upon a debt so barred would not be binding upon creditors holding subsisting debts, or upon the legatees or distributees. The heir at law immediately becomes vested with the title to the real estate, subject only to the debts of the ancestor for such balance as may remain after the exhaustion of the personal assets; and upon principle, if the personal estate is not liable, the real estate so descended cannot be reached.

But aside from the statute of limitations, there were other defenses against a portion of these notes, at the death of John H. Robb, as they are stated in the plea. The rule is well settled that after a debt has remained due and payable for sixteen years, the law holds such lapse of time as *prima facie* evidence of payment, which *prima facie* evidence may be rebutted by proof of a subsequent promise to pay, or some reasons why suit was not brought; and after the lapse of twenty years the presumption of payment becomes conclusive. Let us apply these rules to the notes as stated in the plea. The note falling due February 1, 1841, was due for more than twenty years before

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Didlake vs. Robb.

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the death of the maker. The only credit was entered September 25, 1844, about eighteen years before his death. The note falling due February 1, 1842, has no credit, and was due more than twenty years before maker's death. The note falling due February 1, 1843, had no credit upon it at the death of the maker, and had been due for nineteen years, or about that length of time; leaving only the note for \$500, and upon which a credit of \$300 was entered within about six months after the same became due and payable. As to all but the balance due on this note there was *prima facie* a good defense, without invoking the statute of limitations at the death of said Robb, and a conclusive defense as to the note for \$2,474.

The payments made after this time were made by the administrator, it is presumed, who could not revive the debt by such payment, and thereby create a binding obligation upon herself or any one else.

From a careful consideration of the matters stated in the plea, and the principles of law involved, I am convinced that the promises made by the defendants could not by any possibility secure to them any benefit whatever; promises which they were under no legal or moral obligation to make, and which the plaintiffs had no legal or moral right to exact, and for the nonperformance of which they have no right to complain, and consequently in law there was no sufficient consideration to sustain the promises made, that the plea presents a good defense to the action, and the demurrer thereto must be overruled. To hold otherwise would be to hold that the defendants were liable for the sum of \$21,787.02 for a debt of their ancestor of only \$206 at the time of his death, then binding upon his estate, and which last sum had long ceased to have any binding force against his estate before those promises were made, and none of which debts ever did have any binding obligation upon either of the defendants personally.

Demurrer overruled.



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**ABANDONMENT.** See **PATENTS**, 1, 2, 3, 4.

**ABATEMENT.** See **BANKRUPTCY**, 10.

## "ACT OF GOD."

1. A loss by the "act of God" must be shown to have happened by a natural and unavoidable necessity, arising wholly above the control of human agencies, and independent of human action or neglect. *Dibble & Seligson v. Morgan*, 406
2. Any act of omission or carelessness on the part of the master or crew contributing to the loss, takes away the defense that the loss was occasioned by the act of God. *Id.*

## ACTION AT LAW.

1. When property is seized upon land and libelled as forfeited to the United States for violation of the revenue laws, the case belongs to the common law side of the court, and can only be reviewed by writ of error. *The United States v. 87 Barrels of Rum*, 19
2. When every part of a contract has been executed except the payment of money, the remedy at law (if one exists) is fully adequate to the case; for by an action at law it is precisely the unpaid money which is recovered, with, perhaps, damages for its detention. *Heine v. The Levee Commissioners*, 246
3. The power of compelling parties, after a judgment has been rendered, to pay the amount thereof, or of raising the money by the sale of their property, is an entirely distinct power from that of taxation, and is the special prerogative of the courts. *Id.*
4. An action of debt against the offending parties is the proper action to recover the penalty for a violation of the 4th section of the act approved February 23, 1871 (16 Stat., 440), which forbids a steamer engaged in carrying passengers from carrying as freight any burning or explosive fluid. *The United States v. The O. B. Church*, 275

See **APPEAL**, 5. **EQUITY**, 2, 3. **INTERVENTION AND THIRD OPPOSITION. JURISDICTION**, 2.

**ADMINISTRATORS.** See **EXECUTORS AND ADMINISTRATORS**.

## ADMIRALTY.

1. When a steamboat and her cargo of cotton were seized by the United States for condemnation, and delivered to the claimant on his execu-

tion of a bond for the redelivery of the property, the amount of the judgment to be rendered in a suit on the bond would be the value of the property, estimated at the highest price that could be obtained for it, between the date of the bond and the date of the judgment. *The United States v. Rob Roy and Cargo*, 42

2. A. was the purser of a steamship about to sail from New Orleans to New York. A package marked with his name was delivered to him for which he gave a bill of lading, whereby he agreed to deliver the package to L. in New York, on payment of the value thereof, and in default of payment to return the package to the consignor. The bill of lading indicated that freight had been paid on the package, but no freight was in fact paid or tendered, nor was there any agreement or expectation that freight was to be paid. The package was not placed on the ship's manifest nor stowed with the other freight. A. was not authorized to sign bills of lading. He delivered the package to the proper person in New York, but neglected to collect its value. *Held*, that the package was delivered to A. as the bailee of its owner and was not delivered to the steamship, and that the latter was not liable for its value. *Suarez v. Steamship Geo. Washington*, 96
3. It is no reason why a libellant should not recover for the failure of the defendant to deliver goods according to contract, that no credit is given for the freight earned by defendant in carrying other goods. Such claim should be set up by cross libel. *Maxwell v. The Powell*, 99
4. Goods were shipped at New Orleans on "The Caddo" for Jefferson, Texas, and a through bill of lading given. At Shreveport the trip of "The Caddo" terminated, and all the goods with the bill of lading were transferred to "The Powell." She delivered a part of the goods and demanded freight from the owner. In a suit to recover the value of a portion of the goods which was not delivered by "The Powell," *held*, that she was liable for the goods lost and could not turn the libellant over to "The Caddo" for his remedy. *Ib.*
5. A general creditor of a ship has no lien on the vessel. *Ib.*
6. When a ship is attached by process from a common law court, nothing is or can be seized but the interest of the owner remaining after the maritime liens are satisfied. *Ib.*
7. A sale under such seizure conveys only the title of the owners subject to the maritime liens. *Ib.*
8. The fact that the proceeds of the sale were absorbed in the payment of certain preferred maritime liens, and were not sufficient to pay them in full, so that the attaching creditors received nothing, does not relieve the vessel from other maritime liens. A common law court is without power to divest maritime liens except by payment. *Ib.*
9. When a seaman, while in the discharge of his duty, is injured by reason of the neglect or carelessness of an officer of the boat, the boat is liable for his wages until restored, and for his subsistence and medical attendance in the meantime. *Myers v. The Lizzie Hopkins*, 170
10. Ordinarily, a ship is presumed to be seaworthy. But this presumption is rebutted by proof that she is old and approaching the end of her life as a ship, and that she suddenly failed in a vital part without any apparent cause. *Werk v. Leathers*, 271
11. The owner of a ship who charters her to another tacitly agrees that she is in suitable condition for the use to which she is to be put. *Ib.*

12. If there is a defect in the ship by which she becomes disabled, even though it may not be apparent upon examination, the charterer cannot recover the charter money, and he will be liable for damages occasioned by the defect. *Ib.*
13. The fact that the holder of an admiralty lien has intervened and recovered judgment for the amount of his claim in a state court, in an action *in personam*, the same remaining unsatisfied, is not a bar to a proceeding in admiralty to enforce the lien. *Rogers v. The Reliance*, 274
14. The penalty for a violation of the 4th section of the act approved February 28, 1871 (16 Stat., 440), which forbids a steamer engaged in carrying passengers from carrying as freight any burning or explosive fluid, cannot be recovered by a proceeding *in rem*. An action of debt against the offending parties is the proper remedy. *United States v. The C. B. Church*, 275
15. When at and after the beginning of proceedings in admiralty by the filing of the libel, the court is in actual possession of the *res*, its jurisdiction is not lost by the removal of the *res* from the possession of the court and beyond its territorial jurisdiction, without the consent of libellant. *Otis v. The Rio Grande*, 279
16. The United States courts sitting as admiralty courts ought to carry into effect the sentences and decrees not only of other federal courts of admiralty, but also of the admiralty courts of foreign countries. *Ib.*
17. A person who makes a parol contract for the purchase of a share in a vessel, and receives, jointly with the other owners, possession of the vessel, cannot acquire a lien upon her for maritime services. *Dowling v. The Reliance*, 284
18. A ship carpenter who deposits, for safe keeping, money and other valuables with the captain of a steamboat on which he is employed, has no lien upon the boat therefor. *Smith v. The Royal George*, 290
19. The owner of an old and decayed boat employed libellant, who was a ship carpenter, to assist in building for him the hull of a new boat, and after it was completed, dismantled the old boat and used some of its materials in fitting up the new one: *Held*, that libellant had no lien on the new boat for his wages. *Ib.*
20. A mariner having repeatedly asked for his wages without receiving them, and being in a strange land and in great need of money, agreed to take one-third the amount due him in full payment, and release the ship and owners, and on payment of one-third the amount due signed a receipt in full; *held*, that the agreement to take less than the whole amount due was *nudum pactum* and the receipt no bar to a recovery for the balance due. *Savin v. The Juno*, 800
21. A mariner who is injured in the service of the ship is entitled to be cured at the expense of the ship although no one is in fault, but he cannot recover damages in the nature of extra wages unless there has been some carelessness or other fault on the part of the officers of the ship. *Brown v. The Bradish Johnson*, 801
22. Article XIV of the sailing regulations applied. *Miller v. The W. G. Heves*, 863
23. It is the duty of the owners of a steamboat or other vessel to employ competent and skillful officers and mariners so far as this can be done by the use of ordinary care. A failure in this respect, which results in the injury of one of the mariners, makes the steamboat and her owners liable. *Brown v. The D. S. Cage and Owners*, 401

24. The cost of the recovery of a mariner injured while in the service of the ship is a charge against the ship, and may be recovered in a proceeding in rem, and if he is injured through the neglect or misconduct of the owners or officers of the vessel, he will be allowed damages in the nature of additional wages to be recovered in the same manner. *Id.*

See "ACT OF GOD." APPEAL, 1, 3, 4, 7, 8. AVERAGE. CONTRACTS, 4. CONFISCATION, 6. COLLISION, 1, 2. JURISDICTION, 8, 10. LIENS, 4. SALVAGE, 1, 2. WARRANTY.

AGENT. See LIFE INSURANCE, 2.

AGREEMENT. See AUCTION SALE.

ALABAMA. See REVOLUTIONARY GOVERNMENT, 1, 3, 4.

### ALLEGIANCE.

A citizen of the United States owes his first and highest allegiance to the general government, and not to the state of which he may be a citizen. *The Planters' Bank v. St. John.* 585

AMNESTY. See PARDON AND AMNESTY.

### APPEAL.

1. An appeal in a case of admiralty and maritime jurisdiction not taken to the next term of the circuit court after the rendition of the decree in the district court will be dismissed. *The United States v. \$5,100 in Specie,* 14
2. When property is seized upon land and libelled as forfeited to the United States for violation of the revenue laws, the case belongs to the common law side of the court, and can only be reviewed by writ of error; when such a case is appealed the appeal will be dismissed. *The United States v. 37 Barrels of Rum,* 19
3. In the admiralty an appeal supersedes altogether the decree of the court below, and the case is to be tried in the appellate court as if no decree had been passed in the court from which the appeal is taken. *Steamer Saratoga v. 438 Bales of Cotton,* 75
4. Where the libellant claimed \$27,000 and got a decree for \$900 in the district court, and appealed, the circuit court, being of opinion that the libellant ought to recover nothing, could dismiss the libel at libellant's costs, although no appeal had been taken by claimant from the decree of the district court. *Id.*
5. Although proceedings for confiscation of lands are proceedings at law, and are to be reviewed by writ of error, yet proceedings by way of intervention in the course thereof, setting up a lien on the property, are often in the nature of a bill of equity, and may be reviewed by way of appeal. *The Confiscation Cases,* 231
6. An appeal to the commissioner of internal revenue, for the refunding of a tax illegally collected by the collector of internal revenue, dates from the time the application to have the tax refunded is filed in the office of the commissioner, and not from the time it is lodged with the collector of internal revenue. *Cotton Press Co. v. The Collector,* 296

7. Where no rule is prescribed by the court, the practice of the court as to notice of appeal, and the giving and approval of the appeal bond, makes the rule by which parties must be governed. *Otis v. Rio Grande*, 598
8. Where notice of appeal in an admiralty cause is given in open court, immediately upon the rendition of the decree, and written notice thereof filed with the clerk, and the penalty of the appeal bond fixed by the court, and an appeal bond in the penalty as fixed by the court is filed and approved by the clerk before the close of the term at which the decree appealed from is rendered : *Held*, that the appeal was well taken, although neither the term docket nor minutes of the district court recited any of the foregoing facts, or contained any evidence of the appeal. *Ib.*

See PRACTICE AT LAW, 8.

ASSIGNEE. See BANKRUPTCY, 14, 15, 80.

ASSIGNMENT. See BANKRUPTCY, 23.

### ATTACHMENT.

Under the local law of Georgia, no attachment lies for the recovery of unliquidated damages consequent upon the breach of a contract. *Zerega & Scott v. McDonald*, 496

See EQUITY, 20. JURISDICTION, 13. PRACTICE IN EQUITY, 71.

· ATTAINDER OF TREASON. See CONSTITUTIONAL LAW, 13.

ATTORNEY. See SOLICITOR.

### AUCTION SALE.

A person who intends to bid at a cash sale of a bankrupt's estate, may agree, in case he becomes the purchaser, to sell to another person at a fixed price on terms of credit, when he has no notice that such second person has any purpose to bid at the sale, or has the means to make his bid good. Such an agreement will not avoid the sale. *Citizens' Bank v. Ober*, 80

### AVERAGE.

1. To make a case for general average, the property saved and the property sacrificed must be exposed to a common danger; the sacrifice of a part must contribute to the saving of the residue, and the sacrifice must be voluntary. *Delano v. Cargo of the Gallatin*, 642
2. There can be no contribution for damage caused by the common danger to which both ship and cargo are exposed. *Ib.*

BAILEE. See ADMIRALTY, 2.

### BANKRUPTCY.

1. An act of the state of Louisiana, entitled "An act to provide for the liquidation of banks," approved March 14, 1842, which provided for the forfeiture of the charter of an insolvent bank, for a stay of all

- suits against such bank and for the appointment of commissioners to collect the assets and pay the debts of the bank, and distribute any surplus there might be, among the stockholders, is in effect a bankrupt law for banks, and was suspended by the passage by congress of the general bankrupt act. *Thornhill v. The Bank*, 1
2. Proceedings under said act in the state court, after the passage of the general bankrupt law, were without authority, and void. *Ib.*
  3. The decree of the state court, made by virtue of proceedings under said act declaring the charter of the bank forfeited, constitutes no bar to a proceeding in involuntary bankruptcy against the bank under the general bankrupt law. *Ib.*
  4. An adjudication of bankruptcy, made by the bankrupt court, may be reviewed and reversed or affirmed by the circuit court or judge, upon bill or petition filed under the second section of the bankrupt act. *Ib.*
  5. Such bill or petition may be heard by the circuit judge in chambers, at any place within the circuit, whether within or without the district where the proceedings in bankruptcy are pending. *Ib.*
  6. A bankrupt's discharge will not be set aside where the fraudulent acts on which petitioning creditors rely for the annulling of the discharge were suspected and believed to exist before the discharge, and when the evidence (discovered after the discharge) to prove such fraudulent act is incompetent and inadmissible. *Marionneau's Case*, 87
  7. The United States seized and filed a libel against a steamboat and cargo, as liable to forfeiture for violation of the rules of war. The claimant gave bond for the property, and made an unsuccessful defense against the libel, but set up as a defense to a judgment against him on the bond his discharge in bankruptcy. *Held*, that the debt evidenced by the bond was not created by fraud within the meaning of the thirty-third section of the bankrupt act, even though the claimant used the evidence of false witnesses, and swore falsely himself in making his defense. *The United States v. Rob Roy and Cargo*, 42
  8. When the claim evidenced by such bond was not reduced to judgment until after the adjudication of bankruptcy and the final dividend, *held*, that it was not provable against the bankrupt estate, and consequently was not barred by the bankruptcy. *Ib.*
  9. A discharge in bankruptcy does not bar debts due the United States. *Ib.*
  10. A suit commenced in a state court before bankruptcy, in which the title to the property surrendered by the bankrupt is in controversy, will not be abated by the bankrupt proceedings. *Hewitt, Ex'r, v. Norton, Assignee*, 68
- A state court cannot, by its process, take property surrendered by a bankrupt, from the possession of the assignee in bankruptcy. *Ib.*
12. A sale of a bankrupt's estate made to a solicitor of the assignee, retained generally in the bankruptcy, will be set aside as against public policy. *Citizens' Bank v. Ober*, 80
  13. Where an honest execution is issued against a bankrupt and levied upon his property before a petition for bankruptcy has been filed, the filing of such a petition does not render the execution and all the proceedings under it null and void. *Goddard v. Weaver*, 257
  14. The assignee of a bankrupt is not the assignee of his creditors; he takes only the bankrupt's interest in property; he has no right or title to the interest which others have therein, nor any control over it, further than is expressly given to him by the bankrupt act as auxil-

- lary to the preservation of the bankrupt's interest for the benefit of his general creditors. *Ib.*
15. If, at the commencement of proceedings in bankruptcy, the bankrupt has possession of property subject to certain fixed liens, the assignee succeeds to his possession, and may discharge the liens and dispose of the property for the benefit of the general creditors; or, perhaps, he may sell the property before discharging the liens, and distribute the proceeds in the order of priority of the claims upon them. *Ib.*
16. If, at the commencement of proceedings in bankruptcy, the bankrupt has not possession of a particular property except as bailee, but the same is in the hands of the sheriff under an execution and levy, the assignee cannot take such property out of the sheriff's hands without paying the debt, or seeking the aid of the United States district or circuit court sitting in bankruptcy. *Ib.*
17. If, in such case, the sheriff proceed to sell the property, there is nothing in the bankrupt act which renders void his acts done after the commencement of proceedings in bankruptcy. The possession of the sheriff is a lawful possession; he has a species of property in the thing. *Ib.*
18. The right of the sheriff, in such case to sell, extends to the entire interest of the debtor, and no assignment of that interest in bankruptcy or otherwise can divest the right of the sheriff. *Ib.*
19. If the assignee can show that a sale by the sheriff on an execution levied before the bankruptcy will materially affect the interests of the general creditors, the court will interfere, but not otherwise; it would do this if the bankrupt's interest was only that of a coproprietor, and the others were about to do any act to the property by which the bankrupt's interest would be sacrificed or compromised. *Ib.*
20. When any question is made as to the validity of the judgment under which proceedings are being had, the bankrupt court is the appropriate tribunal to investigate it; and proceedings under the judgment will be restrained as a matter of course, until that question is settled. *Ib.*
21. The lien of a mortgage creditor on the real property of a bankrupt is not lost by his failure to prove his debt, so that after the end of the proceedings in bankruptcy, he cannot enforce his lien. *Assignee of Wicks & Co. v. Perkins,* 383
22. Under the bankrupt act, a trader is insolvent when he cannot pay his debts in the ordinary course of business, although he may not be compelled to stop business on account of such inability, and although on a settlement of his affairs he may have sufficient to pay in full. *Jackson, Assignee v. McCulloch et al.,* 438
23. An assignment to a trustee by a trader of all his property, in trust for the benefit of his creditors, which necessarily puts an end to the business of the trader, and which gives a preference to some creditors over others, is made out of the usual and ordinary course of business, and if made in contemplation of insolvency, is not only *prima facie* but conclusive evidence of an intent on the part of the trader to defeat the operation of the bankrupt act; it is therefore void. *Ib.*
24. The trustee is charged with notice of the insolvency of the debtor, and his intent to evade the provisions of the bankrupt act, by the very tenor of such an assignment, and so are all persons claiming the benefit of the assignment. *Ib.*
25. An omission to include all his property in his schedule is not of itself

- cause for refusing a bankrupt his discharge. The omission must be for the purpose of concealment, or to mislead or defraud. *In re Smith, a bankrupt*, 476
26. Where A., having long since ceased to be a trader, made his note for the payment of an antecedent debt contracted while he was a trader: *Held*, that suspension of payment of the note was not a ground for adjudicating A. a bankrupt. *Jack's Case*, 549
27. Where, by alleged fraudulent collusion between the petitioner and the defendant, proceedings in involuntary bankruptcy are begun to declare the defendant a bankrupt, judgment creditors, who would be damaged by the adjudication, ought to be allowed to intervene and oppose it. *Ib.*
28. A mortgagee with power to sell is, in Georgia, a trustee for the mortgagor, his heirs, etc., and as such is accountable in equity. This relation of trustee is not discharged by the bankruptcy of the mortgagor, but, upon the happening of such event, the trustee can no longer be held to account in a state court. The courts of bankruptcy possess a broad and comprehensive authority, sufficiently extensive to enable them, in such cases, to entertain jurisdiction over the rights of the parties, to take possession of the mortgaged property and administer it in accordance with the bankrupt law. *Lockett v. Hill*, 552
29. A bankrupt court ought not to deprive a creditor of the estate of his just possession under a specific lien. To do so would often involve a sacrifice of his rights. *Davis et al. v. The Railroad Co. et al.*, 661
30. A sale made by an assignee in bankruptcy of property thus unlawfully taken from a receiver (due notice being given of the illegality at the time of the sale), will be set aside, and the purchase money will be ordered to be returned. *Ib.*
31. A contumacious resignation by officers of a company can not prevent the company from filing a petition in bankruptcy, if a majority of shareholders authorize it to be done. *Ib.*
32. The district court having necessarily passed upon the question of the authority of the officers to file the petition in bankruptcy, it cannot be disputed in a collateral proceeding. *Ib.*

See BONA FIDE PURCHASER. LIMITATIONS, 1, 2. MORTGAGE, 6. POWERS, 1. RECEIVER, 16.

BIDDER. See AUCTION SALE.

BILL OF LADING. See ADMIRALTY, 2, 4. COMMON CARRIER, 5, 6. "DANGERS OF THE SEA," 1.

BILLS. See NOTES AND BILLS.

### BONA FIDE PURCHASER.

A person contemplating insolvency conveyed his property to another, in fraud of the bankrupt act, the grantee having notice of and participating in the fraud. After the appointment of an assignee in bankruptcy, the grantee conveyed the same property to a third person: *Held*, that if such third person were a *bona fide* purchaser, without notice of the fraud, his title was good as against the assignee. *Jarrell's Assignee v. Harrell et als.*, 476

**BOND.**

A bond was given in Alabama by the guardian of a minor after the state had seceded and joined the Confederate States, and after the commencement of hostilities between the United States and the Confederate States, conditioned that the guardian should perform all the duties required of him by law: *Held*, that the "law" referred to in the bond was the law of the insurgent government of Alabama, and that a compliance with that law by the guardian discharged the sureties on the bond. *Van Epps v. Walsh et al.*, 598

See ADMIRALTY, 1. BANKRUPTCY, 7. BREACH. PRACTICE AT LAW, 1.

**BREACH.**

In an action on the official bond of a collector of internal revenue, where the breach alleged was his failure to account for or pay over the sum of \$64,000, it was *held* that dereliction of duty in not collecting said sum could not be shown in order to establish the breach. *The United States v. Glenn et al.*, 400

See BOND.

CAPITAL STOCK. See CORPORATIONS, 1, 4, 5.

**CAPTURE, TITLE BY.**

1. A capture of a steamer, within the insurrectionary district, by the forces of the United States, vested in the government of the United States an absolute title to the property, without the necessity of any legal condemnation. *White v. Red Chief*, 40
2. The fact that the libellant, who was at the time of the capture resident in the district in insurrection, afterwards came into the United States and took the oath prescribed by the acts of congress, could not divest the title of the government. *Ib.*

See CONFISCATION, 13. CAPTURED AND ABANDONED PROPERTY.

**CAPTURED OR ABANDONED PROPERTY.**

Where a treasury agent seized a lot of cotton as captured or abandoned property, and the same was transported to New Orleans: *Held*, that the claimant of the cotton could not be required to pay the freight and charges on the same if the cotton was taken from his possession against his will and was not in fact captured or abandoned. *Steamer Saratoga v. 438 Bales of Cotton*, 75

See CAPTURE, TITLE BY, 1, 2.

CITIZENS. See CONSTITUTIONAL LAW, 1, 2, 3, 4, 5, 6, 11, 25. CITIZENSHIP EQUITY, 2.

**CITIZENSHIP.**

1. A citizen of the United States owes his first and highest allegiance to the general government and not to the state of which he may be a citizen. *The Planters' Bank v. St. John*, 585

2. A citizen of one of the late insurgent states, who adhered to the cause of the United States and retired within the federal lines, and remained there during the rebellion, continued to be a citizen of the United States, notwithstanding the secession and belligerency of his own state, and notwithstanding his purpose to return to that state after hostilities might cease. *Ib*
3. An averment in a declaration that a party defendant is a citizen of the southern district of Alabama is equivalent to an averment that he is a citizen of the state of Alabama, and is a sufficient averment of the latter fact. *Berlin & Son v. Jones*, 636
4. In a suit brought in the circuit court of the United States, by reason of the citizenship of the parties, a corporation of the state, of which the complainant is a citizen, cannot be made a defendant. *Voss v. Reed et al.*, 647

**CIVIL RIGHTS BILL.** See CONSTITUTIONAL LAW, 10, 15, 27. **INDICTMENT**, 2, 3. **MARRIAGE.** STATUTES CONSTRUED, 10.

**COLLATERAL PROCEEDING.** See **BANKRUPTCY**, 82. **JURISDICTION**, 5, 6, 8, 9, 18. **WRIT**, 2.

### COLLISION.

1. It is no defense to a libel to recover damages resulting from a collision to say that nothing could be done at the moment to prevent it, if it could have been avoided by reasonable precautions or ordinary foresight. *Miller v. The W. G. Hewes*, 363
2. When a steamer through its own fault collided with a skiff in which were the libellant and his son, whereby the son was drowned and the libellant so seriously injured as to confine him to his bed for seven weeks, and render him unfit for labor until the date of the decree and partially disable him for life, and the skiff was broken, the court allowed as damages the necessary cost of repairs to the skiff with compensation for the loss of its use while undergoing repairs, the cost of the cure of libellant, also a sum of money as compensation for his sufferings, also a sum equal to the amount of such wages as the libellant with the aid of his son could have earned up to the time of the decree, and compensation for his permanent partial disability. The latter was arrived at by the present allowance of a sum equal to the amount of such income as the ordinary labor of libellant would produce for one-third of the period of his expectation of life according to the mortality tables. *Ib.*

**COLLUSION.** See **BANKRUPTCY**, 27.

**COLORED PERSONS.** See CONSTITUTIONAL LAW, 1, 2, 15, 16, 27. **INDICTMENT**, 2, 3. **MARRIAGE.** STATUTES CONSTRUED, 10.

**COMITY.** See **ADMIRALTY**, 16

**COMMON COUNTS.** See **COMMON CARRIERS**, 19.

### COMMON CARRIERS.

1. A person who has sold goods and delivered them to a common carrier to be conveyed to the vendee, cannot maintain an action against the common carrier for their loss. *Blum, Frank & Co. v. The Cadde*, 64

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2. A common carrier to whom goods are delivered for carriage cannot of his own motion set up title in another as a reason for not delivering the goods to the shipper or his consignee. *Rosenfield v. The Express Co.*, 131
  3. But when the carrier, upon demand made or suit brought by the real owner, delivers the goods to him, such delivery will be a defense to an action brought by the shipper or his consignee for the value of the goods. *Ib.*
  4. When goods have been delivered by a carrier to a person other than the shipper or his consignee, not entitled to them, and the latter delivers the goods to the shipper or consignee, or pays him their value, in a suit against the carrier for the nondelivery of the goods, the shipper or consignee can only recover nominal damages. *Ib.*
  5. Where several carriers unite to complete a line of transportation and receive goods for one freight, and give a through bill of lading, each carrier is the agent of all the others to accomplish the carriage and delivery of the goods, and is liable for any damage to them, on whatever part of the line the damage is received. *Harp v. The Grand Era*, 184
  6. A carrier's liability ceases when he has delivered the goods according to the bill of lading. In the absence of a special contract the goods are to be regarded as delivered when they are deposited upon the proper wharf at their place of destination, at a proper time, and notice given to the consignee, and he has had a reasonable time and opportunity, after notice, to remove them. *The Tybec*, 358
  7. A usage or special custom, prevailing at a particular port and brought to the knowledge of the parties, may vary this rule. *Ib.*
  8. When it was the known usage and custom of the agents of a ship to keep goods in their possession after being landed upon the wharf, to take care of them, to protect them in case of rain, and to put them in a warehouse after delivery hours, for which they made a charge in addition to the freight; *held*, that they were bound to use ordinary diligence in taking care of the goods as long as the same remained in their possession, and the ship was liable for damages to the goods arising from the negligence of the ship's agents. *Ib.*
  9. By the general usage of commercial and maritime law, a carrier by water must convey from port to port or from wharf to wharf. He is not bound to deliver goods at the warehouse of the consignee. It is the duty of the consignee to receive his goods out of the ship or upon the wharf. *Dibble & Seligson v. Morgan*, 406
  10. To constitute a good delivery upon the wharf, the carrier should give due and reasonable notice to the consignee, so as to give him a fair opportunity of providing suitable means to remove the goods or put them under proper custody. *Ib.*
  11. The goods of the various consignees when landed must be placed in separate piles. Where the goods of several consignees were piled together in one bulk upon the wharf during a rainy and stormy day, and covered with tarpaulins so as not to be fairly open to the inspection of consignees, and a fair chance afforded to remove them; *held*, that this was no delivery. *Ib.*
  12. An actual inspection of the goods and their removal by the consignee is not necessary to a delivery, but there can be no delivery without the opportunity to inspect and remove. *Ib.*

13. A common carrier may by contract limit his common law liability, but he cannot contract for immunity from liability for his own negligence or misconduct. *Earnest v. The Express Co.*, 573
14. Common carriers have a right to demand good faith and fair dealing from those whom they serve. So where by notice brought home to a shipper, an express company made known that it would not be liable to a greater amount than fifty dollars for the loss of unvalued packages, and the shipper to avoid paying the regular charges of the company failed to disclose the value of a package delivered for carriage, and led the company to treat it as of small value, whereby it was lost, it was held that the shipper could only recover fifty dollars, although the package was of much greater value, and although the company, had the value of the package been made known to it, might have been considered guilty of negligence. *Ib.*
15. The reception by an express company of a package for transportation to a point beyond its route, and the receipt of the entire compensation for the transportation to that point, is sufficient to make out a *prima facie* case of contract to carry and deliver the package to that point. *St. John v. The Express Co.*, 612
16. To avoid liability in such case, the company must show a specific contract to carry only to its own terminus, or a settled and uniform rule not to assume liability beyond that point, which rule must be brought home to the consignor, either by express notice, or by a notoriety so general that he may be fairly presumed to have had notice. *Ib.*
17. Plaintiff delivered a package addressed to a consignee in New York, to defendant, an express company in Mobile, paid the freight for the entire distance and took a receipt, stating that "this company is to forward the same to its agent, nearest or most convenient to destination only, and then to deliver the same to other parties, they to complete the transportation; such delivery to terminate all liability of the company for such package. The company's route extended only to Lynchburg, but it had an arrangement with the Adams Express Company to transport such packages to any point on the latter's route, and receive a *pro rata* share of the freight: *Held*, that the Adams Express Company was the agent of defendant, within the terms of the receipt, and defendant was liable for failure to deliver in New York. *Ib.*
18. If an express company has a settled and uniform rule that money packages must be sealed and indorsed in a certain way, and such rule is brought home to the knowledge of the consignor, who neglects or intentionally omits to comply with it, and the company in ignorance of the special value of the package, takes ordinary care of it only, the company will not be liable for the loss. *Ib.*
19. If, however, the money is stolen by an agent of the company, and the company recovers the money from the thief, it will be liable for the amount so recovered, upon a count for money had and received, notwithstanding the violation of its rules by the consignor. *Ib.*

See "DANGERS OF THE SEA."

#### COMPROMISE.

If a creditor chooses to take fifty per cent. on the dollar from some of his debtors, no promise made to them will compel him to accept payment at a similar rate from others. *Molyneux's Administrator v. Marsh*, 452

See EQUITY, 14.

## CONFISCATION.

1. The fact that a good defense existed against a decree of condemnation, but which was not pleaded before decree, will not avoid the decree. *Griswold v. Connolly*, 198
2. A seizure of property under the confiscation acts, made by the marshal, upon the written order of the United States attorney, is sufficient to give the court jurisdiction of the *res*. *Bragg v. Lorio*, 209
3. The amnesty proclamation of the president, of July 4, 1868, did not have the effect to restore to the party out of whom before that time the title had been divested, property condemned, and the title to which was vested in the United States, by confiscation proceedings. *Ib.*
4. A Confederate agent in Paris could not transfer to a neutral property within the Union lines as security for a loan, after it became subject to confiscation, so as to defeat the right of the United States to seize and confiscate the same. *The Confiscation Cases*, 221
5. The right of the United States to confiscate enemies' property in New Orleans accrued on the passage of the confiscation act, July 17, 1862. *Ib.*
6. The proceedings under the fifth, sixth, seventh and eighth sections of the confiscation act of July 17, 1862, are *in rem*, conforming as near as may be to proceedings in admiralty when the seizure is on water, and to revenue cases when the seizure is made on land. *Ib.*
7. In case of seizure of land or property on land when no answer is filed, judgment by default may be taken, and the court may proceed to ascertain the material facts in the case *ex parte* and without a jury. *Ib.*
8. If a third person intervenes for the purpose of setting up some charge or lien upon the property and not of resisting the confiscation, collateral proceedings may be taken suitable to the nature of the case. *Ib.*
9. A belligerent has the right to take such course and impose such conditions with regard to the confiscation of enemies' property, as it sees fit. *Ib.*
10. By the act of July 17, 1862, congress directed property to be seized and confiscated as enemies' property. A proceeding under this act is not, therefore, a criminal proceeding, and many rules which must be observed in criminal prosecutions have no application. *Ib.*
11. The general rule, that a judicial sale under a judgment which the court had jurisdiction to render, will stand, although the judgment itself be reversed for error, applies to sales made by virtue of a decree of confiscation. *Ib.*
12. Under the confiscation act of July 17, 1862, as explained by the joint resolution of congress of the same date (12 Stat., 627), the forfeiture of real estate confiscated as enemies' property does not extend beyond the natural life of the party whose property is confiscated. *Ib.*
13. Land conveyed to the Confederate States government, for the purpose of aiding the rebellion, became the property of the United States by right of conquest, *ipso facto*, and no proceedings were necessary for confiscation or forfeiture, and when such proceedings were taken, they were void. *United States v. A Tract of Land*, 475

See CONSTITUTIONAL LAW, 13.

CONFUSION. See MERGER, 2, 3.

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### CONSTITUTIONAL LAW.

1. The first section of the fourteenth amendment of the constitution, applies as well to white as colored persons, as citizens of the United States; and is intended to protect them in their privileges and immunities, as such citizens, against the action, as well of their own state, as of other states in which they may happen to be. *The Slaughter House Case*, 21
2. These privileges and immunities do not consist merely in being placed on an equality with others; but embrace all the fundamental rights of citizenship. *Ib.*
3. One of these fundamental rights is that of pursuing any lawful employment in a lawful manner; or, in other words, the right to choose one's own pursuit, subject only to constitutional regulations and restrictions. *Ib.*
4. Police regulations made for the preservation of the public health, order and morality, and not expressly prohibited by the constitution, are among the reserved powers of the states, and are not an interference with the rights of citizenship. *Ib.*
5. But an exclusive privilege, granted to a few individuals, and their successors, incorporated into a society, to have and keep cattle landings, stock yards and slaughter houses in the city and neighborhood of New Orleans, with a prohibition to all others from having or keeping any such establishments therein, is a restriction which violates the fundamental rights of other citizens willing to conform to all police regulations adopted for the public comfort and safety. *Ib.*
6. A legislative act granting such an exclusive privilege is a violation of the fourteenth amendment, and void. *Ib.*
7. Such a law cannot be sustained under the power to pass police regulations and license laws, or the power to grant exclusive rights for the exercise of public franchises. *Ib.*
8. Public franchises, such as the establishment of highways, turnpikes, railroads, ferries, markets, etc., are not common rights, but are public privileges, granted by the legislature upon such terms as it sees fit. *Ib.*
9. The law above described allows certain privileged persons to pursue an ordinary employment, and prohibits others from doing so, and thus goes to establish one of those monopolies which are contrary to the spirit of a free government. *Ib.*
10. The civil rights bill as far as it goes covers the same ground as the fourteenth amendment to the constitution of the United States. *Ib.*
11. An incorporated company is not a citizen of the United States, or a person within the meaning of the first section of the fourteenth amendment to the constitution of the United States. *The Insurance Co. v. The City of New Orleans*, 85
12. Following the construction of the supreme court of Louisiana it is held that a law imposing a higher tax upon a foreign corporation doing business within the state, than upon a domestic corporation, is not in violation of the state constitution, which declares that "taxation shall be equal and uniform throughout the state." *Ib.*
13. The constitutional provision which declares that "no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted," does not apply to the confiscation of en-

- emies' property even though those enemies be rebels against the government and, therefore, guilty of treason. *The Confiscation Cases*, 221
14. Congress has power to legislate for the enforcement of any right granted by the constitution; but the power must be exercised according to the nature of the grant or guaranty. If it only be that congress or the legislature of a state shall not pass laws for abridging the right, it is a guaranty against acts of the government only, state or federal, and not against the acts of individuals; and in such case congress has not power to legislate over the subject generally; but only to provide remedies or redress in case the legislature or congress itself (as the case may be) should violate the prohibition. The fourteenth amendment of the constitution does not change the power of congress in this respect. *The United States v. Cruikshank*, 808
15. The thirteenth amendment confers upon congress full power to legislate on the subject of slavery, and to pass all laws it may deem proper for its entire eradication in every form. The civil rights act of 1866 was within this power. *Ib.*
16. The fifteenth amendment does not confer upon congress the power to regulate the right to vote generally; but only to provide against discrimination on account of race, color or previous condition of servitude. Congress, therefore, cannot legislate in reference to any interference with the right to vote, which does not proceed from that cause, unless in elections of senators or representatives. A conspiracy to prevent a colored person from voting is no more a United States offense than a conspiracy to prevent a white person from voting, unless entered into by reason of the voter's race, color or previous condition of servitude. *Ib.*
17. An act of the legislature of Texas whereby a railroad company was incorporated and a grant of lands made on certain conditions to be performed by the company is a contract between the state and the company within the meaning of section 10, article I of the constitution of the United States. *Gray v. Davis*, 420
18. A provision of the constitution of Texas adopted subsequently to the passage of such an act, annulling it, impairs the obligation of the contract, and is therefore void. *Ib.*
19. The state of Texas granted lands to a railroad company on certain conditions which the company performed. A provision in a new constitution of the state purported to annul the grant, and the governor commenced signing patents to private parties for lands included in the grant: *Held*, that a bill in equity filed against "Edmund J. Davis, Governor of Texas" to restrain him from issuing patents for lands included in the grant, is not a suit against the state of Texas within the meaning of article XI of amendments to the constitution of the United States. *Ib.*
20. The fact, that when the state of Georgia applied for readmission to the Union, under the constitution of 1868, congress imposed certain conditions, does not make that constitution an act of congress, or tantamount to such an act. *Marsh et al v. Burroughs et al.*, 463
21. A state can no more pass a law violating a contract by means of a convention, than it can by means of a legislature; and a constitution adopted by a state, with a view to its admission or readmission, or after its admission into the Union, must be regarded as a law of the state, and amenable to the prohibitory clauses of the constitution. *Ib.*
22. The final portion of art. V, sec. XVI, subdivision 1 of the constitution of Georgia, of 1868, which throws the burden of proof on the plaintiff

to show that bills sued on have never been used in aid of the rebellion, if only the defendant swears that he has reason to believe that they were so used, is not constitutional. *Ib*

23. The act of the legislature of Georgia, approved October 18, 1870, which provided that in all suits brought in any court of the state, founded on any debt or contract made before June 1, 1865, or in renewal thereof, the plaintiff should not have verdict or judgment unless the court was satisfied that all taxes upon said debt or contract had been paid for each year since the incurring or making thereof, and that in every trial upon such debt or contract, the fact that the same had been legally returned for taxes, and the taxes paid thereon, should be a condition precedent to a recovery; impairs the obligation of contracts and is therefore unconstitutional and void. *Lathrop v. Brown*, 474
24. Where a charge of misconduct is made against an officer, whether amounting to an indictable offense, or only to his discredit as such officer, which might furnish grounds for his removal or impeachment, he is not bound to be a witness against himself. *The United States v. Collins*, 499
25. An inquisitorial examination, under oath, of a party charged with an offense or misconduct, would infringe the spirit if not the letter of the fifth amendment to the constitution of the United States, and would be repugnant to the principles of personal liberty embodied in the common law. *Ib*.
26. A statute of Georgia which took effect March 16, 1869, and which declares that all actions upon contracts, etc., which accrued prior to June 1, 1865, shall be brought before January 1, 1870, or both the right and right of action shall be barred, does not impair the obligation of contracts and is not unconstitutional. *Samuels v. The Bank*, 528
27. The marriage relation between white persons and persons of African descent is prohibited, and declared null and void by the law of Georgia: *Held*, that marriage laws are under the control of the states and that the law named is not annulled or affected by the civil rights bill of congress or the fourteenth amendment to the constitution of the United States. *Ex rel. Hobbs and Johnson*, 537
28. A law or ordinance which revives a claim already barred by the statute of limitations interferes with vested rights, and is unconstitutional. *Lockhart v. Horn*. 628

See STATUTES CONSTRUED, 13, 14, 15.

CONTEMPT. See PRACTICE IN EQUITY, 71, 72.

## CONTRACTS.

1. Where parties are in treaty by letter and telegraph to make a contract, there must be a distinct offer on one hand and an acceptance of it on the other, showing a concurrence of the minds of the parties upon all the terms of the contract before either party is bound. *Deahon v. Fosdick & Co.*, 286
2. A., in Boston, was in correspondence with B., in New Orleans, in reference to the chartering of a ship to B. to carry freights from New Orleans to Europe, and represented that the ship would sail from Boston for New Orleans on a day certain. *Held*, that the representation amounted to a warranty that the ship would sail on that day. The ship did not sail for two days after the time fixed; therefore, B. was not bound. *Ib*.

8. A mariner having repeatedly asked for his wages without receiving them, and being in a strange land, in great need of money, agreed to take one-third the amount due him in full payment, and release the ship and owners, and on payment of one-third the amount due, signed a receipt in full: *Held*, that the agreement to take less than the whole amount due was *nudum pactum*, and the receipt no bar to a recovery for the balance due. *Savin v. The Juno*, 800
4. The owners of a steamer entered into a contract for the carriage of 70,000 staves, in which was this stipulation: "we agree to forfeit \$1,000 if we fail to carry out this contract." The contract was partly performed by the carriage of 57,000 staves, and the part performance accepted. *Held*, that the contract provided for a penalty to cover actual damages, and did not provide for liquidated damages, and as no actual damage was shown, none was allowed: *Taylor v. Steamer Marcella*, 802
5. A contract for the purchase of cotton made during the late war of the rebellion, by a subject of the king of Norway and Sweden, domiciled in the city of New York, with a citizen of the state of Texas, actually residing therein at the date of the contract, was void as against public policy and the laws of war and the spirit of the legislation of congress. *Habricht v. Alexander's Executor*, 418
6. The obligation of a contract is what the parties intended by it when they entered into it. To ascertain the meaning of a contract, the courts are authorized to consider the circumstances of the parties at the time they made it. *Van Epps v. Walsh et al*, 598

See ATTACHMENT. ACTION AT LAW, 2. COMMON CARRIERS, 15, 16, 17.  
COMPROMISE. CONSTITUTIONAL LAW, 17, 18, 21, 22, 23, 26.

CONTRIBUTION. See AVERAGE.

## CORPORATIONS.

1. The ownership of stock does not give the stockholder any legal estate in the property of the corporation. *Morgan v. The Railroad Co. et al.*, 15
2. The appropriate party to sue for an injury done or threatened to a corporation is the corporation itself, acting by its legal officers and managers, and not the stockholders. *Ib.*
3. A corporate body created by the laws of one state may maintain an action in the state or federal courts of another state. *The Insurance Co. v. The "C. D. Jr."*, 72
4. Unpaid subscriptions to the capital stock of a company are corporate property, constituting a trust fund which can be reached by the creditors in a court of equity. *Marsh et al v. Burroughs et al.*, 468
5. The amount subscribed, and not the sums actually paid in, is the capital stock of the company. *Ib.*

See BANKRUPTCY, 81. CONSTITUTIONAL LAW, 8, 11, 12. CITIZENSHIP, 4.  
JURISDICTION, 12, 13. STATUTES CONSTRUED, 8. STOCKHOLDER.

## CORRESPONDENCE.

1. The correspondence between a district attorney, representing the United States, and the attorney general, is confidential in its nature and cannot be cited by third persons. *United States v. Six Lots of Ground*, 234

2. When parties are in treaty by letter and telegraph to make a contract there must be a distinct offer on one hand and an acceptance of it or the other, showing a concurrence of the minds of the parties upon all the terms of the contract, before either party is bound. *Deshon v. Fosdick & Co.*, 288

COTTON-BALE TIE. See PATENTS, 6, 9, 10, 23, 24, 25.

CREDITORS. See BANKRUPTCY, 27, 29.

CROSS LIBEL. See ADMIRALTY, 8.

CUSTOM. See COMMON CARRIERS, 7, 8, 16, 18.

DAMAGES. See ACTION AT LAW, 2. ADMIRALTY, 1, 12, 21, 24. ATTACHMENT. MEASURE OF DAMAGES. MERGER, 8.

### "DANGERS OF THE SEA."

1. By the exception "dangers of the sea," as used in bills of lading, is meant all unavoidable accidents from which common carriers by the general law are not excused unless they arise from the act of God. *Dibble & Seligson v. Morgan*, 406
2. A loss which might have been avoided by proper foresight and prudence cannot be attributed to "dangers of the sea," and to relieve the carrier from liability for such loss, he must show that due diligence and proper skill were used to avoid the accident, and that it was unavoidable. *Id.*

DEBT, ACTION OF. See ACTION AT LAW, 4.

### DECISIONS OF STATE COURTS, WHEN BINDING ON FEDERAL COURTS.

1. The decision of the state courts of Georgia that the statute passed in 1826, and reenacted in 1881, by which the surety or indorser of a promissory note, after it has become due, may require the holder to proceed to collect the same, and if he does not proceed so to do within three months after such requisition, the indorser or surety shall be no longer liable, does not apply where the principal does not reside in the state — that he cannot be compelled to go out of the state to sue the principal, is binding on the federal courts in Georgia. *Davis v. Hatcher, Ex'or*, 456
2. In passing upon questions of general commercial law the federal courts are not bound by the decisions of the courts of the state where the contract in question was made or is sought to be enforced. *Jewett v. Hone*, 530

See BANKRUPTCY, 8.

DELIVERY. See COMMON CARRIERS, 6, 8, 9, 10, 11, 12.

DEPUTY CLERK. See JURISDICTION, 5. STATUTES CONSTRUED, 4.

DISCHARGE IN BANKRUPTCY. See BANKRUPTCY, 6, 9, 25.

DISCOVERY. See PRACTICE IN EQUITY, 7, 8, 47, 48, 50, 51, 52, 53.

**DISTRICT COURT.** See **PRACTICE AT LAW**, 7.

**DUTIES.** See **STATUTES CONSTRUED**, 2.

### DUTY OF A SOLDIER.

A soldier is bound to obey only the lawful orders of his superior officers. *United States v. Carr*, 480

### EQUITY.

1. A tax payer, who is liable to be assessed for the public taxes that will be necessary to pay the state debt and interest thereon, cannot maintain a private suit against the state officers to prevent them from executing and issuing bonds which the legislature has unconstitutionally authorized and required to be issued. *Morgan v. Graham*, 124
2. It is a general rule that an individual cannot maintain a private suit for an injury which he sustains in common with every other citizen. *Ib.*
3. The proper administration of the government in its several departments cannot be enforced by private actions brought by any tax payer or voter interested in the good government of the country. *Ib.*
4. A bill in equity against a board of levee commissioners to obtain, by means of the enforcement of the levy and collection of a tax by them, payment of money due on bonds, which they had issued under authority of an act of the legislature, and which directed them to levy an annual tax to pay the interest, and to create a sinking fund for the payment of the principal of the bonds, cannot be maintained as a bill to enforce the specific performance of a contract. *Heine v. The Levee Commissioners*, 246
5. Nor can such a bill brought by the holders of the bonds against the board of levee commissioners be maintained as a bill for an account. *Ib.*
6. A court of equity has general jurisdiction of liens, inasmuch as a court of law cannot, except by execution, order a sale of the property which is subject to the lien, and cannot conveniently distribute the proceeds to those who may be entitled thereto. *Ib.*
7. A bill praying that a board of levee commissioners, the state district judge or a receiver or commissioner to be appointed by the court, be required to levy a tax for the purpose of raising the money alleged to be due to complainants, in a case where no judgment has been obtained, cannot be maintained. *Ib.*
8. Courts of equity will not grant relief against a judgment at law except when the injured party has had a verdict or judgment rendered against him in consequence of accident or mistake or fraud of the other party without any fault of his own, and has no remedy, or has without fault lost his remedy at law. *Railroad Co. v. Neal*, 858
9. Where a motion had been made on the law side of the court to set aside a verdict and judgment and grant a new trial, and had been overruled: upon a bill in equity filed for relief against the judgment, on the ground that it was unjust, and there was a good defense, that the defendant in the case at law had been surprised on the trial, and that he did not have a full and fair hearing on the motion for a new trial in consequence of the indisposition of his counsel, this court sitting in equity refused the relief and dismissed the bill. *Ib.*

10. If the trustees of a mortgage on a railroad are parties to a suit, a decree rendered in the case is as binding on the bondholders secured by it, as if they had been made parties, unless they can show some fraud practiced upon, or connived at, by the trustees themselves. *Campbell v. The Railroad Co.*, 868
11. Trustees named in a mortgage to secure bondholders were made parties defendant to a bill to foreclose the mortgage filed by certain of the bondholders and allowed a decree to be taken by default; *held*, that this supineness was a constructive fraud against the bondholders whom they represented; and if taken advantage of by the complainants in the suit, to the prejudice of the bondholders, the complainants became participants in the fraud. *Ib.*
12. Where complainants are allowed to dispense with parties on account of their numerousness, any one of whom would have the right to come in by petition, such complainants ought to proceed in the utmost fairness and good faith in procuring a final decree which is to be binding on all. *Ib.*
13. Land was conveyed to a grantee, the vendor retaining a vendor's lien for a part of the purchase money. The grantee conveyed to a trustee, who took the title in trust for a joint stock company, and went into possession. The original vendor prosecuted a proceeding to foreclose his vendor's lien without making the trustee a party: *Held*, that the right of the company to redeem was not foreclosed. *King v. The Young Men's Association*, 386
14. When a decree is rendered against several defendants, a compromise by complainant, with some, as to their portion of the debt, does not release the other defendants. *Molyneux's Adm'r v. Marsh*, 452
15. A judgment creditor, who has exhausted his legal remedy by execution returned *nulla bona*, may alone, or with other judgment creditors, file a bill against persons holding property of the debtor, which on account of fraud, or the existence of a trust, cannot be reached by the execution. *Marsh et al. v. Burroughs et al.*, 463
16. A judgment creditor, who has exhausted his legal remedy, may pursue in a court of equity any equitable interest trust or demand of his debtor, in whosoever hands it may be. If a party thus reached has a remedy over against others for contribution or indemnity, it will be no defense to the primary suit against him, that they are not parties. *Ib.*
17. Where a debtor, as in case of a bank, has a right to call for payment of stock subscriptions, and does not choose to exercise it, equity, at the instance of creditors, will exercise it for him. *Ib.*
18. Unpaid subscriptions to the capital stock of a company are corporate property constituting a trust fund which can be reached by creditors in a court of equity. *Ib.*
19. Where the stockholders of a bank are individually liable, the equity of the right in the bank to sue for unpaid subscriptions of stock is attendant on the legal right vested in the holder of the bills as such; it goes with it as an incident. *Ib.*
20. A judgment in attachment will be enjoined in equity if the defendant had no actual notice, and had a good defense, and his failure to make defense was owing not to any fault or negligence on his part, but to the fault of the plaintiff. *Zerega & Scott v. McDonald*, 496
21. A decree in equity will not be declared void for fraud because there may be suspicious circumstances connected with its rendition. Fraud

will not be presumed. It must be satisfactorily shown. *Jones et al. v. Brittan et al.*, 667

See APPEAL, 5. BANKRUPTCY, 29, 30. JURISDICTION, 2, 3, 4, 7. LIENS 1, 2. MORTGAGE, 3, 4. PRACTICE IN EQUITY, 1, 5, 6, 10, 40, 42, 57, 71. STOCKHOLDER, 1.

EQUITY OF REDEMPTION. See EQUITY, 13.

## ERROR.

When upon the whole record it appears that the petitioner had no case, the judgment of the court below will not be reversed, even though the court may have erred in some of its rulings. *Marionneau's Case*, 37

See ACTION AT LAW, 1. APPEAL, 2. CONFISCATION, 11. PRACTICE AT LAW, 1, 2, 3, 6, 7.

ESTATE OF DECEDENT. See SUCCESSION.

EVIDENCE. See LIFE INSURANCE, 1, 2. RECEIVER, 3. PRACTICE IN EQUITY, 63, 64, 65, 66.

EXCEPTIONS. See PRACTICE IN EQUITY, 20, 21, 22, 23, 31, 32, 45.

EXECUTORS AND ADMINISTRATORS. See PRACTICE IN EQUITY, 12, 24, 58, 59, 63, 65. SUCCESSION, 1, 4.

EXPRESS COMPANIES. See COMMON CARRIERS, 14, 15, 16, 17, 18, 19.

FIFTH AMENDMENT. See CONSTITUTIONAL LAW, 25

## FORFEITURE.

An attempt was made to transport without a license, and contrary to the 30th section of the act of congress of July 18, 1861, and 3d section of the act of May 20, 1862, property from the United States to the territory declared to be in insurrection: *Held*, that such property becomes subject to forfeiture to the United States, notwithstanding the insurrectionary district to which it was being conveyed was at the time in the possession of the federal forces. *The United States v. Gay's Gold*, 55

See CONFISCATION, 12, 13.

FOURTEENTH AMENDMENT. See CONSTITUTIONAL LAW, 1, 2, 3, 4, 5, 6, 10, 11, 14, 27.

## FRACTIONS OF A DAY.

Courts will regard fractions of a day when it is necessary to ascertain which of two events first happened. Thus, where a power to sell mortgaged premises was made to the mortgagee, and a lease of the mortgaged premises to a third person was made at the same time, which lease was referred to in the power, the court noticed the fact that the lease was executed previously to the power, for the purpose of ascertaining whether the mortgagee had been actually put in possession of the mortgaged premises or not. *Lockett v. Hill*, 552

**FRAUD.** See **BANKRUPTCY**, 7. **EQUITY**, 21. **LIFE INSURANCE**, 8, 4.

**GENERAL AVERAGE.** See **AVERAGE**.

**GEORGIA.** See **ATTACHMENT**. **BANKRUPTCY**, 28. **CONSTITUTIONAL LAW**, 20, 22, 23, 26, 27. **JURORS**, 8, 4, 5. **LIMITATIONS**, 9, 10, 11. **MARRIAGE**. **MORTGAGE**, 5, 6, 7. **PRACTICE IN EQUITY**, 61, 62. **POLITICAL QUESTION**. **POWERS**, 4, 7. **STATUTES CONSTRUED**, 15, 16, 19, 20, 21, 22, 23, 24.

### GUARDIAN.

1. A guardian who receives assets of his ward incurs an obligation even without bond, to improve the estate and account for and pay it over to his ward, with its increase and profits. *Van Epps v. Walsh*, 598
2. He can be relieved of this obligation in one of two ways only; either by its full performance, or by discharge therefrom by a court of competent jurisdiction, authorized to act in the premises. *Id.*

See **BOND**. **REVOLUTIONARY GOVERNMENT**, 1, 8.

### HOMICIDE.

1. The willful killing of a soldier by the sergeant of the guard, while on duty, is not necessarily a justifiable homicide. *The United States v. Carr*, 480
2. The order of a superior military officer to an inferior will not, of itself, justify the willful killing of another. *Id.*
3. No mere words, applied by one man to another, will justify the use of a deadly weapon; nor can they be the lawful occasion of that "heat" which would reduce the act of killing from murder to manslaughter. *Id.*

**IMPROVEMENT.** See **LIENS**, 8.

### INDICTMENT.

1. An indictment based on the 21st section of the act approved March 3, 1825 (4 Stat., 121), which names the person whom the accused intended to defraud by the passing of the counterfeit coin, need not also name the person to whom the coin was passed. *United States v. Bejandio*, 294
2. An indictment, under the enforcement act or civil rights bill, for violating civil rights, should state that the offense charged was committed against the person injured by reason of his race, color or previous condition of servitude. *United States v. Cruikshank*, 808
3. A charge that the defendants conspired to injure certain persons of African descent, being citizens of the United States, thereby to prevent them from exercising their rights as citizens, such as the right to peaceably assemble, to bear arms, etc., unless accompanied with an averment that the injury was committed by reason of the race, color, or previous condition of servitude of the person conspired against, is not sustainable in the courts of the United States. *Id.*
4. The last clause of the 78th section of the act of congress, approved July 28, 1868, entitled "an act imposing taxes on distilled spirits and tobacco" (15 Stat., 159), contains no exception so incorporated in the body of the enactment that it must be negatived in an indictment founded on the clause. *The United States v. Imsand*, 581

5. The offenses of effecting an entry, and of aiding and assisting in effecting an entry, of goods, etc., at less than their true weight or measure, by means of false samples or false representations, etc., may be charged conjunctively in the same count of an indictment. *The United States v. Bettilini*, 654
6. An indictment under sec. 8 of the act of March 8, 1868 (12 Stat., 739), charging the defendant with effecting an entry of goods by fraudulent means, must specify what fraudulent means were used, otherwise it is bad. *Ib.*

### INDIVIDUAL LIABILITY.

1. The stockholders of the Merchants and Planters' Bank of Savannah, whose charter provides "that the persons and property of the stockholders shall be at all times liable, pledged and bound for the redemption of the bills and notes of the bank, at any time issued, in proportion to the number of shares that each individual may hold and possess," are liable as principals to redeem the bills of the bank at their face, after the bills have been presented to the bank and payment refused, although the assignee of the bank has assets in his hands sufficient to pay the bills. *Hatch v. Burroughs*, 439
2. Where the stockholders of a bank are individually liable, the equity of the right of the bank to sue for unpaid subscriptions of stock is attendant on the legal right vested in the holder of the bills as such; it goes with it as an incident. *Marsh et al. v. Burroughs et al.*, 468

**INFRINGEMENT.** See PATENTS, 7, 13, 14, 15, 19.

### INJUNCTION.

1. If the state courts sustain and attempt to enforce a law which grants exclusive privileges to a few individuals incorporated into a society, to have and keep cattle landings, stock yards and slaughter houses, in the city and neighborhood of New Orleans, with a prohibition to all others from having or keeping such establishments therein, the circuit court of the United States cannot issue an injunction to stay proceedings, being prohibited by the act of 1793. *The Slaughterhouse Case*, 21
2. By the civil rights bill, the circuit court may take cognizance of such a case, and grant an injunction, except for staying proceedings in a state court. *Ib.*
3. A federal court cannot interfere by injunction to restrain a sale of the property of A. on an execution issued out of a state court against the property of B. *Daly v. The Sheriff*, 175
4. The writ of injunction issues on the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of that right which, on just and equitable grounds, ought to be prevented. *McComb v. Ernest*, 195

See BANKRUPTCY, 20. EQUITY, 20. PATENTS, 26, 27, 28, 29.

**INSOLVENCY.** See BANKRUPTCY, 22, 23, 24. **BONA FIDE PURCHASER.**

**INSOLVENT LAW.** See BANKRUPTCY, 1, 2, 3.

### INSURANCE.

Where insured property was committed to the custody of a common carrier for transportation, and was lost, and the insurance company paid the owner the value of the property; *held*, that the insurance company could maintain an action against the carrier, although it was not legally bound to indemnify the insured for the loss. *The Insurance Co. v. The "C. D., Jr."* 72

See LIFE INSURANCE.

### INTERVENTION AND THIRD OPPOSITION.

Where the marshal had levied an execution on a crop of sugar and molasses, the intervention and third opposition of parties claiming a superior lien and privilege on the property, asking that the marshal be required to retain sufficient of the proceeds to pay the claim of the interveners and for judgment against the judgment debtor for the amount of said claim, is a proceeding upon the law side of the court, and the interveners are not compelled to resort to a bill in equity for relief. *The Bank v. Labitut*, 11

See CONFISCATION, 8.

### JUDGMENT.

A sale of a fraudulent judgment at a public vendue of a bankrupt's effects does not confer upon an innocent purchaser the right to enforce payment of the judgment, notwithstanding its fraudulent character. *Noyes v. Willard*, 187

### JUDICIAL SALE.

It is a general rule, that a judicial sale made by virtue of a judgment which the court had jurisdiction to render will stand, though the judgment itself be afterwards reversed for error. *United States v. Six Lots of Ground*, 234

See BANKRUPTCY, 16, 17, 18, 19. JUDGMENT.

### JURISDICTION.

1. Unless a party has a right to sue in the local courts, he cannot sue in the federal courts. The latter cannot create a right to sue, and can only take jurisdiction when the right exists by law, and the plaintiff and defendant are citizens of different states. *Morgan v. The Railroad Co. and others*, 15
2. The property of A., consisting of a lease and stock of goods, was seized by the sheriff to satisfy an execution issued out of a state court against the property of B., and on the demand of the sheriff, an indemnity bond for the benefit of A. was furnished by the execution creditor; *held*, that an action on such bond, or an action of trespass against the sheriff, is not such an adequate and complete remedy at law as would oust the jurisdiction of a court of equity of a bill filed to restrain the sale of the property of A. by the sheriff. *Daly v. The Sheriff*, 176

3. Where an assignee in bankruptcy recovered a fraudulent judgment against an alleged debtor of the bankrupt, and the judgment debtor filed a bill in the circuit court to enjoin execution upon the judgment; *held*, that the fact that all parties were citizens of the same state did not oust the court of jurisdiction. *Noyes v. Willard*, 187
4. The fact that a state statute has provided a remedy at law against a fraudulent judgment does not preclude the judgment debtor from a resort to the equity courts of the United States for relief against it. *Ib.*
5. When a party claimed title under a rule made upon a writ of *venditioni exponas*, which was defective in that it was signed by the deputy clerk in his own name, and not by the clerk, the defect could be taken advantage of only in a direct, and not in a collateral proceeding. *Griswold v. Connelly*, 198
6. In an action to recover possession of and establish title to real estate, when the defendant relies upon title derived through confiscation proceedings, no error or irregularity in such proceedings can be regarded which does not go to show want of jurisdiction in the court which rendered the judgment condemning the property. The judgment is binding until reversed in a direct proceeding. *Bragg v. Lorio*, 209
7. Where two courts have concurrent jurisdiction, the one which first obtains actual jurisdiction of the parties and subject matter is entitled to proceed to final adjudication, and neither party can be forced into another forum, except as provided by the acts of congress for the removal of causes from the state to the federal courts. *Haines v. Carpenter, Ex'r.*, 262
8. Where a court has jurisdiction of the *res* in a proceeding *in rem*, the record of its decree cannot be collaterally attacked for errors and irregularities appearing therein. *Otis v. The Rio Grande*, 279
9. When the jurisdiction of a court depends upon a fact which the court is required to ascertain in its decision, such decision is final until reversed in a direct proceeding for that purpose. *Ib.*
10. When at and after the beginning of proceedings in admiralty by the filing of the libel, the court is in actual possession of the *res*, its jurisdiction is not lost by the removal of the *res* from the possession of the court and beyond its territorial jurisdiction, without the consent of the libellant. *Ib.*
11. When G., a citizen of the state of New York, was appointed by a court of competent jurisdiction receiver of the property of a railroad corporation created by the laws of Texas, and domiciled in that state, the circuit court of the United States for the western district of Texas had jurisdiction of a suit brought by such receiver against citizens of that district. *Davis v. Gray*, 420
12. The United States circuit court has jurisdiction of a suit brought against a citizen of the state in which the court is held, by a citizen of another state, upon a note payable to A. or bearer, notwithstanding the note may have been indorsed to the plaintiff by payee, and although the declaration contains no averment that the payee could have sued. *Varner v. West*, 498
13. When from the answer of the garnishees, it appears that there are no debts due the defendants in attachment in the county where the proceedings are commenced, and none of their property is seized in the county, the county court has no jurisdiction to proceed further in the case. *Zerega & Scott v. McDonald*, 496

14. The United States circuit court has no jurisdiction of a cause in which the complainants, and a part only of the defendants, are citizens of the same state, although such defendants voluntarily appear and answer without objecting to the jurisdiction. *Lockhart v. Horn*, 628
15. In such a case, the citizenship of the parties being disclosed by the bill, and no objection to the jurisdiction being made *in limine*, complainants may dismiss their bill as to the obnoxious defendants, and hold it as to the others. *Ib.*
16. In a suit brought in the circuit court of the United States, by reason of the citizenship of the parties, a corporation of the state, of which the complainant is a citizen, cannot be made a defendant. *Voss v. Reed et al.*, 647
17. If the same corporators, composing such corporation, become incorporated in the state where the suit is brought, the corporation thus formed may be made a defendant. *Ib.*
18. When a case has been submitted to and passed upon by a court having jurisdiction, its decree cannot be collaterally impeached, except for fraud. *Jones et al. v. Britten et al.*, 667

See BANKRUPTCY, 82. CORPORATION, 8. CONFISCATION, 2. PRACTICE AT LAW, 7, 8. STATUTES CONSTRUED, 5. WILL, 2.

### JURORS.

1. The act of congress of July 20, 1840 (5 Stat., 894), prescribing how jurors in courts of the United States shall be designated, does not require a minute adherence to the state practice on that subject by the United States courts. *The United States v. Collins*, 499
2. It is not necessary, under said act, for the United States courts to employ state officers to perform for them any part of the duty of designating jurors. They may and should impose that duty entirely on their own officers. *Ib.*
3. The law of Georgia required that the names of jurors should be taken from the book of the receiver of tax returns; *held*, that this requirement was not binding on the courts of the United States. Those courts were only required to take care that their jurors had the same qualifications as jurors in the state courts. *Ib.*
4. A rule of the United States court for the southern district of Georgia, which prescribed that the names of five hundred persons, having the qualifications of jurors under the state law, should be selected from the body of the district by the marshal and clerk and three United States commissioners, to be designated by the court, and that the names of grand and petit jurors should be drawn from such list by the marshal and clerk, by lot, is in substantial accord with the law of Georgia prescribing how jurors shall be selected, and is a compliance with the act of congress on the subject. *Ib.*
5. One of the officers appointed to select the names of five hundred persons from whom jurors were to be drawn, applied to a reputable citizen of a distant county for the names of proper persons residing in his vicinity to be placed upon the list. The names furnished, in compliance with this request, were submitted to the board of officers whose duty it was to make out the list of five hundred names, and some of the names so furnished were put upon the list: *Held*, that this was a substantial compliance with the rule which required the selection of the names to be made by the board of officers. *Ib.*

JURY. See TRIAL BY JURY.

## LAWS OF WAR.

1. A declaration of war or the commencement of actual hostilities between two states *ipso facto* dissolves the partnership relation existing between citizens of the hostile states. *The Planters' Bank v. St. John*, 535
2. Where a partnership consisted of three members, citizens of and doing business in one of the late insurgent states, and soon after the commencement of hostilities, one of the partners removed within the federal lines and adhered to the federal cause, and the other partners remained and assumed to continue the business in the firm name, their acts only bind themselves; the partnership is dissolved by the existence of hostilities between the sections and the relations of the partners as enemies. *Ib.*

See CONTRACTS, 5. CONFISCATION, 4, 5, 9, 18.

## LEGACY AND LEGATEE.

Under the Code of Louisiana a particular legacy is to be discharged in preference to all others out of the funds of the succession; and in default of funds, it is to be paid as long as the estate is administered by executors, indifferently out of the personal and real estate. It becomes a charge upon the whole estate and descends to the heir as a personal debt when he takes possession. *Labitut v. Prewett*, 144

See STATUTES CONSTRUED, 6. SUCCESSION, 1, 3, 4, 5.

## LIBEL OF INFORMATION.

A libel of information filed for the confiscation of property as enemies' property which charges the acts of the owner of the property in the alternative, thus: "did act as an officer of the army or navy of the rebels in arms against the government of the United States, or as a member of congress, or as a cabinet officer of the so-called Confederate States," etc., is bad, for ambiguity and uncertainty, and in fact contains no charge at all, and a decree of confiscation rendered thereon by default will be reversed. *The Confiscation Cases*, 221

## LIENS.

1. Partnership creditors, merely as such, have no lien on the partnership property before obtaining judgment and execution; but can only be subrogated to the lien of the partners, and are therefore without remedy where such lien has been waived by them. *Case, Receiver, v. Beauregard et al.*, 125
2. Where real and personal property are purchased under proceedings on a junior incumbrance to which a senior incumbrancer is not made a party, an attempt made by the senior incumbrancer to bring the property to sale to satisfy his claim, is not an attack upon the title of the purchaser under the junior incumbrancer, nor any invasion of his rights. *Palmer v. Burnside*, 179
3. A covenant by a landlord to pay for improvements erected by a tenant does not constitute a lien upon the premises for the value of the improvements. *The Confiscation Cases*, 221

4. A general creditor of a ship has no lien on the vessel. *Maxwell v. The Powell*, 99

See ADMIRALTY, 6, 7, 8, 13, 17, 18, 19, 23, 24. BANKRUPTCY, 15, 21, 29. EQUITY, 6. MORTGAGE, 1, 2. PRACTICE IN EQUITY, 42. PAYMENT. 3. VENDOR'S LIEN, 1, 2, 3.

### LIFE INSURANCE.

1. The certificate of the examining physician of a life insurance company is evidence of its recitals, and is conclusive unless the opinion of the physician was influenced by fraudulent representations or concealment of material facts. *Holloman v. The Life Insurance Co.*, 674
2. An insurance company is not permitted to prove that the examining physician was incompetent; he was the agent of the insurer and not of the insured. *Ib.*
3. A declaration that the insured had not previously had a severe disease, *held*, not to include the ordinary diseases of the country which yield readily to medical treatment, and do not tend to shorten life. *Ib.*
4. A misrepresentation to avoid the policy must have been in relation to a material fact that would have probably induced the insurer to decline the risk. *Ib.*
5. The insured had, for a period of three months, about three years previous to the contract of insurance, disease of the bowels, having been perfectly healthy during the interval; this fact was not communicated to the insurers; the insured died about three years after the policy was issued, of a disease of an entirely different character: *Held*, that the previous sickness was not material, and the fact that it was not communicated would not avoid the policy. *Ib.*

### LIMITATIONS.

1. The fact that an assignee in bankruptcy did not discover his right to certain property of the bankrupt, until after the expiration of two years from the time an action accrued to him therefor, does not remove the bar prescribed by the second section of the bankrupt act. *Norton, Assignee v. De la Villebeuve*, 163
2. The bar prescribed by that section applies to causes of action which had accrued to the bankrupt before his bankruptcy as well as to those which accrued to the assignee after the bankruptcy. *Ib.*
3. A plea which alleges just title, good faith, the requisite period of possession, and that possession continued peaceful and without interruption, sets out all the circumstances which the laws of Louisiana require to exist as the basis of a prescription. *Gaines v. Agnelly*, 233
4. If a title be obtained in good faith, and under the honest belief that the author was the real owner of the property, it is *prima facie* sufficient to lay the foundation of a prescription in good faith; any information, knowledge or belief to the contrary, obtained since the possession commenced, cannot under the laws of Louisiana impair the efficacy of such possession as a ground of prescription. *Ib.*
5. The act of congress approved June 11, 1864, which suspends the running of the statute of limitations during the rebellion, is not itself a statute of limitation. *Graydon v. Sweet*, 418
6. Article 12 of the constitution of Texas, which declares that "the statutes of limitation of civil suits were suspended by the so called act of seces-

sion of January 28, 1861, and shall be considered as suspended within this state until the acceptance of this constitution by the congress of the United States," does not conflict with the act of congress approved June 11, 1864, which suspends the running of the statutes of limitation during the rebellion. *Ib*

7. The constitution of Texas was accepted on March 29, 1870. Therefore when an action was commenced on May 8, 1871, for goods sold in 1860, the plea that more than two years had elapsed after the cause of action had accrued and before suit brought, and that more than four years had elapsed after the close of the war and after the time the court was reopened to suitors, was held bad and stricken out. *Ib.*
8. When a bank has suspended payment and its bills have ceased to circulate as money, the statutes of limitation apply to them as to other contracts. *Samples v. The Bank,* 528
9. The sixth section of the act of the legislature of Georgia, approved March 16, 1869, entitled "an act in relation to the statute of limitations and for other purposes," applies to a suit founded on the notes of a suspended bank. *Ib.*
10. The suspension of the statute of limitations provided for by the act of congress, approved June 11, 1864 (18 Stat., 123), did not continue in Georgia after the proclamation of the president, of April 2, 1866. *The United States v. Muhlenbrink,* 569
11. The fact that no term of the United States court for the northern district of Georgia was held until September 10, 1866, and no clerk of that court appointed until that date, did not continue the suspension of the statute until that time. *Ib.*
12. The fact that civil war was raging in Alabama and other states, from the date of the act of secession in 1861, to the close of hostilities in 1865, is not sufficient ground for suspension of legal remedies and acts of limitations as between citizens of the Confederate States, the courts of the state having been open to all citizens of the Confederate States, and there being no law to prohibit them from resorting thereto. *Lockhart v. Horn,* 628
13. Unless a country is actually occupied by hostile forces, and its laws and courts are suppressed, the courts are not allowed the discretion to decide when, and when not, the statutes of limitation are in operation, as between its own citizens only. *Ib.*
14. At common law, after the lapse of sixteen years, there arises the legal presumption that the debt has been paid; and, after the expiration of twenty years, this presumption becomes conclusive. *Didlake v. Robb,* 680
15. A law or ordinance which revives a claim already barred by the statute of limitations interferes with vested rights, and is unconstitutional. *Lockhart v. Horn,* 628

See CONSTITUTIONAL LAW, 26, 28. NOTES AND BILLS, 4. STATUTES CONSTRUED, 15, 16.

LOUISIANA. See BANKRUPTCY, 1. CONSTITUTIONAL LAW, 12. LIMITATIONS, 3, 4. LEGACY. MUNICIPAL CORPORATIONS. PRACTICE IN EQUITY, 8. POSSESSORS, 1, 2, 3, 4. STATUTES CONSTRUED, 4, 6. WILL, 1.

## MANDAMUS.

If officers who are charged with the duty of laying or collecting taxes, refuse to perform their functions, the courts, in a clear case of fail-

ure, and at the instance of a party directly interested, can, by the prerogative writ of *mandamus*, compel them to perform acts which are ministerial, as distinguished from those which are judicial or discretionary. *Heine v. The Levee Commissioners*, 246

**MANIFEST.** See STATUTES CONSTRUED, 9.

**MANSLAUGHTER.** See HOMICIDE.

### MARRIAGE.

The marriage relation between white persons and persons of African descent is prohibited and declared null and void by the law of Georgia; *held*, that marriage laws are under the control of the states, and that the law named is not annulled or affected by the civil rights bill of congress or the fourteenth amendment to the constitution of the United States. *Ex rel. Hobbs and Johnson*, 537

**MARINERS.** See SEAMEN.

**MASTER.** See PRACTICE IN EQUITY, 2, 3, 31, 33, 33, 34.

### MEASURE OF DAMAGES.

1. Where a contract for the payment of money is made in one country, payable in the currency of that country, upon suit brought in another country to recover for breach of the contract, the plaintiff ought to recover such a sum in the currency of the country where the suit is brought, as would be equivalent to the sum to which he would be entitled in the country where the debt is payable, calculated by the real and not the nominal par of exchange. *Hargrave v. Creighton*, 489
2. Where, by notice brought home to a shipper by an express company, made known that it would not be liable to a greater amount than fifty dollars for the loss of unvalued packages, and the shipper, to avoid paying the regular charges of the company, failed to disclose the value of the package delivered for carriage and led the company to treat it as of small value, whereby it was lost, it was held that the shipper could only recover fifty dollars, although the package was of much greater value, and although the company might have been considered guilty of negligence had the value of the package been made known. *Earnest v. The Express Co.*, 578

See COLLISION, 2. COMMON CARRIERS, 4, 14. PATENTS, 16, 17, 18.

### MERGER.

1. Where a senior incumbrancer wrongfully carried away personal property subject to his own and a junior incumbrancer, his debt was not extinguished by "confusion" to the extent of the value of the property carried off. *Palmer v. Burnside*, 179
2. *Confusion* and *merger* are synonymous terms. *Id.*
3. A debt cannot be merged in a tort—nor can any part of it be extinguished by a credit or setoff claimed for unliquidated damages arising from a trespass. *Id.*

**MISSISSIPPI.** See STATUTES CONSTRUED, 3.

**MONOPOLIES.** See CONSTITUTIONAL LAW, 5, 6, 7, 9.

**MORTGAGE.**

1. The owner or lessee of land may give a valid mortgage upon his crop before it is raised. *Ellott v. Butt et al.*, 214
2. The transfer to the purchaser of land of a note given to the former owner for rent, and the transfer of a mortgage on the crop to secure the note invests such purchaser with the lien created by the mortgage. *Ib.*
3. At common law, a mortgage transferred the legal title to the mortgagee who could at any time take possession of the property and hold it until his debt was paid and the land redeemed. *King v. The Young Men's Association*, 886
4. Equity, however, gave the mortgagor the right to redeem, which could not be taken from him by anything short of judicial process or a release from himself or great lapse of time in demanding his rights. *Ib.*
5. In Georgia a mortgage is merely a security for debt, and passes no title, estate or interest to the mortgagee. Therefore a power of sale in a mortgage is not, in Georgia, a power coupled with an interest, but is merely a collateral power. *Lockett v. Hill*, 552
6. It follows that, in Georgia, a power of sale contained in a mortgage cannot be executed after the mortgagor has been adjudged a bankrupt. *Ib.*
7. If a mortgagee acquire possession of real property after the expiration of a lease made by the mortgagor to a third person, and there is no evidence that the property was rented to him by the mortgagor, he will, in Georgia, be a mere tenant at will or at sufferance. *Ib.*
8. A deed, absolute on its face, will not be held to be a mortgage unless the grantee, as well as grantor, understood the purpose of the conveyance to be the security of a debt. *Jones et al. v. Brittan et al.*, 667

See BANKRUPTCY, 21. STATUTES CONSTRUED, 3.

**MORTGAGEE.** See BANKRUPTCY, 28.

**MOTION.**

The judgment or order of a court finally disposing of a case, cannot be reviewed at a subsequent term on motion. The only relief for errors in law in such cases is by review, writ of error or appeal, as either may be appropriate. *The Bank v. Labitut*, 11

**MULTIFARIOUSNESS.**

1. A bill which united a controversy raised by the heirs of testatrix touching the validity of the bequests in the will, with the claims of the heirs of the husband of testatrix to the property bequeathed by the will, and with the suit of a creditor seeking judgment against the succession, and with a demand for an account to be rendered by the executor, was held to be multifarious. *Haines v. Carpenter, Ex'r.*, 262
2. Courts of equity will not allow a multifarious bill as a remedy for a multiplicity of suits. *Ib.*
3. A bill is not objectionable for multifariousness because it joins defendants holding distinct tracts of land, under different conveyances, if

the main ground of defense is common to all the defendants. *Gaines v. Mausscaux*, 118

### MUNICIPAL CORPORATIONS.

The state of Louisiana conferred upon the city of New Orleans the power to levy a license tax upon trades, professions and callings. Under this authority, *held*, that the city might levy a tax upon foreign corporations double that levied upon domestic corporations, and that such a discrimination was not so unreasonable as to render the tax void. *The Insurance Co. v. The City of New Orleans*, 85

**MURDER.** See **HOMICIDE**.

### MUTINY.

In the suppression of a disorder or mutiny among soldiers, the means used should be proportioned to the end to be gained. Violent measures, clearly unnecessary, will not be justified. But officers, charged with the good order of a camp or fort, will not be required to weigh with scrupulous precision the exact amount of force necessary to suppress disorder. *United States v. Carr*, 480

### NEGLIGENCE.

The omission of the holder of a promissory note to sue the maker, who resides in another state, can, under no circumstances, as between him and the surety on the note, make the holder chargeable with gross negligence. *Davis v. Hatcher, Ex'r's*, 456

See "ACT OF GOD." **ADMIRALTY**, 21, 22, 23. **COMMON CARRIERS**, 13.

**NEW ORLEANS.** See **CONFISCATION**, 5. **MUNICIPAL CORPORATIONS**. **STATUTES CONSTRUED**, 1.

**NEW TRIAL.** See **EQUITY**, 8, 9.

### NOTES AND BILLS.

1. No matter how illegal or immoral the consideration of a note or bill may be, it is valid in the hands of a *bona fide* holder for value, unless made absolutely void by statute. Notes, bills, or other securities issued in aid of the rebellion are valid in the hands of a *bona fide* holder, for value. *Hatch v. Burroughs*, 439

2. After dishonor, a promissory note does not lose its character as such, nor cease to be a negotiable instrument. The only effect of the dishonor is to let in the defenses of the maker as against the payee. *Varnor v. West*, 493

3. An accommodation acceptor of a bill of exchange transferred before maturity, by the drawers in liquidation of their own preexisting debt, cannot defend an action against him on the bill by alleging that he was an accommodation acceptor only, and that the fact was known to the holders of the bill when they took it. *Jewett v. Hone*, 530

4. A promissory note given by the heir, in renewal of a note made by his ancestor which was barred by limitation at the death of the ancestor, is void for want of consideration. *Didlake v. Robb*, 680

See **JURISDICTION**, 12. **MORTGAGE**, 2. **NEGLIGENCE**. **PAYMENT**, 1, 2, 3. **STATUTES CONSTRUED**, 5.

NOTICE.

1. Actual notice of a deed is quite as effectual as constructive notice based on the record of the deed. *King v. The Young Men's Association*, 886
2. A dissolution of partnership by the fact of war renders express notice of the dissolution unnecessary. *The Planters' Bank v. St. John*, 585

See APPEAL, 8. RECORD OF DEEDS.

NOVELTY. See PATENTS, 21, 22.

NUDUM PACTUM. See ADMIRALTY, 20.

OFFICER.

1. A public officer cannot, by subsequent declarations, invalidate his own official act. *The United States v. Collins*, 499
2. A probate judge in the state of Alabama, whose term of office had not expired at the date of the secession of the state, but who held over and served out his term after the state had joined the Confederate States, and the war of secession had commenced, became a judge of the new insurgent government of Alabama, without any new election or appointment. *Van Epps v. Walsh et al.*, 598

See BANKRUPTCY, 31. CONSTITUTIONAL LAW, 24.

PARDON AND AMNESTY.

1. Pardon and amnesty do not annul past transactions so far as to invalidate a previous judicial confiscation and sale of a claimant's property. *United States v. Six Lots of Ground*, 284
2. A pardon containing a condition, that the person to whom it was granted should not claim any of his property or the proceeds thereof, that had been sold by the order, judgment or decree of a court, under the confiscation laws of the United States, is a bar to his claim. *Ib.*
3. A pardon may be partial or subject to conditions, but the conditions must be lawful ones. *Ib.*

See CONFISCATION, 8.

PAROL CONTRACT. See ADMIRALTY, 17.

PARTIES. See EQUITY, 10, 12, 13, 15, 16. PRACTICE IN EQUITY, 12, 26, 37, 38, 39, 41, 42, 43, 51, 54, 58, 59, 61, 65, 66, 69, 74.

PARTNERSHIP.

1. A declaration of war or the commencement of actual hostilities between two states *ipso facto* dissolves the partnership relation existing between citizens of the hostile states. *The Planters' Bank v. St. John*, 585
2. When a partnership consisted of three members, citizens of and doing business in one of the late insurgent states, and soon after the commencement of hostilities one of the partners removed within the

federal lines, and adhered to the federal cause, and the other partners remained and assumed to continue the business in the firm name, their acts only bound themselves; the partnership was dissolved by the existence of hostilities between the sections and the relations of the partners as enemies. *Ib.*

3. Under such circumstances an agreement between the partners that the partnership shall continue is against public policy and void. *Ib.*

4. A dissolution of partnership by the fact of war renders express notice of the dissolution unnecessary. *Ib.*

See LIENS. TRUST, 1, 2.

### PATENTS.

1. The fact of abandonment must result from the intention of the patentee expressly declared or clearly indicated by his acts. *Johnson v. Fassman*, 138

2. The issue of letters patent by the patent office is *prima facie* evidence that there has been no voluntary abandonment of his invention to the public by the inventor, either before or after his application for letters patent. *Ib.*

3. The rule to be deduced from the authorities on the question of abandonment after application is, that after the issue of letters patent, the abandonment must be shown to be positive, actual and intentional by some act or declaration of the inventor, or by such gross laches as indicate unmistakably an intention to abandon the invention to the public. *Ib.*

4. Where nothing was relied upon to defeat complainant's patent but the inventor's delay in prosecuting his application for the patent, his application having been finally rejected by the commissioner, April 11, 1857, and not appealed until August 16, 1866, during four years of which time the patent office was closed to him by reason of his residence in a state that was in rebellion: *Held*, that no direct or implied abandonment was shown. *Ib.*

5. A patent relates back to the date of the application; and patents granted to other inventors during the pendency of such application, so far as they cover the same invention, are void, and are no protection to an infringer. *Ib.*

6. A cotton-bale tie, in which the lower edges of the transverse slots are provided with lips or flanges projecting downward at an angle with the plane of the buckle, to prevent the end of the band from slipping *held* to be infringed by a tie in which the slots are provided with toothed or serrated edges for the same purpose. *Ib.*

7. There may be a claim for two inventions in the same patent if they both relate to the same machine or structure; and an action can be sustained for the infringement of either one of these separate inventions when claimed as separate and distinct in their character. *McComb v. Brodie*, 153

8. Where plaintiff's patent covered three different features of invention, but suit was brought on one claim only, the jury were instructed to consider the case precisely as if the patent covered that claim alone. *Ib.*

9. The third claim of Cook's patent of March 2, 1858, for cotton-bale tie, construed to be for the right to use an open slot cut in a buckle, which without the cut would be a closed buckle, so as to allow the end of the tie or hoop to be slipped sidewise underneath the bar through which the slot is cut. *Ib.*

10. If a party uses the open slot for passing the end of a cotton tie side-wise under the slotted bar, it makes no difference whether such end is in the form of a loop or not, if the result attained is that the end of the tie has been "slipped sidewise through the slot underneath the bar, so as to effect the fastening with greater rapidity than by passing the tie through endwise." *Ib.*
11. A man cannot have two patents for the same process because for different purposes. *Ib.*
12. When the means, devices and organization are patented, the patentee is entitled to the exclusive use of this mechanical organization, device or means, for all the uses and purposes to which it can be applied, without regard to the purposes to which he supposed, originally, it was most applicable. *Ib.*
13. To constitute infringement the contrivances must be substantially identical, and that is substantial identity which comprehends the application of the principle of the invention. *Ib.*
14. If a party adopts a different mode of carrying the same principle into effect, and the principle admits of different forms, there is an identity of principle though not of mode; and it makes no difference what additions to or modification of a patentee's invention a defendant may have made; if he has taken what belongs to the patentee, he has infringed, although with his improvement the original machine or device may be much more useful. *Ib.*
15. All modes, however changed in form, but which act on the same principle and effect the same end, are within the patent; otherwise a patent might be avoided by any one who possessed ordinary mechanical skill. *Ib.*
16. The rule of damages at law is not what the defendant has made, or what he might have made, but it is the loss sustained by the plaintiff by reason of the infringement. *Ib.*
17. If plaintiff was ready to supply the market with his patented goods, and his business was hindered or interfered with by the competition of defendant, plaintiff's damage will be the amount or profit which he has lost by reason of such interference. *Ib.*
18. If a plaintiff neglects to prove that his patented article was stamped, or that he gave to the infringer the notice required by section 88 of the patent act of 1870, a jury cannot award him more than nominal damages. *Ib.*
19. It is competent for a party to sue for an infringement of any one of the separate and distinct inventions that may be covered by his patent. *McComb v. Ernest,* 195
20. The fact that other devices, superior to that covered by complainant's patent taken as a whole, have been invented, and have driven the latter out of use, does not prove or tend to prove that such invention lacks utility, as the law uses that term. *Ib.*
21. The presumption, created by the issue of letters patent, that the patentee was the first and original inventor, is greatly strengthened by the extension of the patent, especially when the extension is resisted on the ground of want of novelty. *Ib.*
22. While the decision of the commissioner of patents is not entitled upon this question to the force of *res adjudicata*, yet it is a determination entitled to the respect of the courts, and should not be reversed except upon satisfactory proof. *Ib.*

23. The open slot in the metallic cotton-bale tie, patented to Frederick Cook, March 2, 1858, held not to have been anticipated by an elongated open ring, such as is used for fastening parts of chains together. No use to which the latter could naturally be applied would suggest the open slot in a rectangular flat buckle for the introduction of a flat band sidewise. *Ib.*
24. Said invention held not to have been anticipated by the English patent to George Hall, No. 2,561, A. D. 1801. *Ib.*
25. The buckle described in the English provisional specification of Pallmer, A. D. 1856, held not to be described in such terms that the public could construct and put it to the use designed by Cook, without further invention. *Ib.*
26. The fact that defendant has taken out patents for other improvements relating to the same subject is no reason why he should not be enjoined from infringing upon the improvement covered by complainants' patent. *Ib.*
27. Where complainants produced their patent; proved an uninterrupted use of the invention, without infringement, for eleven years; had established their patent by an act at law, in which every defense known to the law might have been set up, and had obtained an extension of the patent in the face of vigilant and interested opposition, a preliminary injunction was granted. *Ib.*
28. Property in a patent is just as much under the protection of the law as property in land. *Ib.*
29. When the owner has made good his claim to his patent and shown an infringement of it, it is the duty of the courts to give him the same relief meted out to suitors in other cases. *Ib.*

### PAYMENT.

1. In general, unless otherwise specially agreed, the taking of a promissory note for a preexisting debt is treated *prima facie* as a conditional payment only, and is a payment if the note is paid. *Risher v. The Frolic*, 92
2. A negotiable promissory note will operate as an extinguishment of a prior existing debt if it is so intended by the parties. *Ib.*
3. Where a pilot held an account for wages against a steamboat, and took the note of the owner of the boat for the amount, signed by another person as security, due in 80 days, with interest at a rate higher than the account bore, and receipted the account as paid in full by the note; *held*, that these facts, with other circumstances, showed a purpose on the part of the payee to take the note in extinguishment of his debt, and that his lien upon the steamboat was lost. *Ib.*

### PLEADING IN EQUITY.

1. If, in a case in equity any circumstances exist which render it improper or inequitable to carry on proceedings in the court, they can always be brought to the notice of the court by motion or petition in the suit; or may be pleaded in bar or abatement. A formal bill for the purpose is needless litigation. *Fuentes v. Gaines*, 112
2. If a plea contain matter proper for a demurrer, for a plea in bar, for a plea in abatement, and for an answer, it is bad for duplicity. *Gaines v. Mauseaux*, 118

3. Defendant in equity has no right as a matter of course to file more than one plea. But when great inconvenience might otherwise result in a particular case, the court will sometimes in its discretion allow several pleas. *Noyes v. Willard*, 187
4. Where a defendant in equity has filed several pleas without leave of the court, he will be put to his election as to which he will stand upon. *Ib.*
5. In general when a defendant insists by plea upon matter which is apparent on the face of the bill and might be taken advantage of by demurrer, the plea will not hold. *Ib.*
6. Where want of jurisdiction appears upon the face of the bill, the objection should be taken by demurrer. *Ib.*
7. The well known rule of chancery pleading, that if a defendant submits to answer, he shall answer fully to all matters of the bill, is abrogated, in cases where the defendant might by plea protect himself from such answer and discovery, and in his answer sets forth the matter of such plea as a bar to the merits of the bill, by the 39th rule in equity established by the supreme court of the United States. *Gaines v. Agnelly*, 238
8. If the bar set up in the answer is a sufficient defense to the whole relief sought by the bill, it is immaterial whether the defendant answer the allegations of the bill or not. He is not bound to answer them; and the rule no longer applies that if the defendant does answer at all, even on matters outside of the bar, he must answer fully. *Ib.*
9. A bill of review may be conjoined with a bill for relief against a fraudulent decree. *Campbell v. The Railroad Co.*, 368
10. If a decree be satisfied, the execution should be arrested on motion, without a new bill. *Molyneaux's Adm'r v. Marsh*, 452
11. If a bill does not contain specific interrogatories, the complainant must be satisfied with such answer to its allegations as would fairly occur to the professional mind as meeting them in a substantial manner. *Parsons v. Cumming*, 461
12. Defendant is not bound to exercise ingenuity in finding out all the aspects in which a statement in a bill may be taken. *Ib.*
13. A general answer is sufficient for a general allegation. *Ib.*
14. If it is apparent that defendant has omitted to answer any material allegation, or has evaded giving an answer, or has answered disingenuously, the court will compel another answer. *Ib.*
15. Where discovery is a principal object, distinct interrogatories should be affixed to the bill. *Ib.*
16. Under the 39th equity rule, when a defendant sets up in his answer the bar of the statute of limitations, and the same is well pleaded, he is thereby excused from further answer to such parts of the bill as are covered by it. *Samples v. The Bank*, 528
17. A plea to the jurisdiction of the court must be pleaded by itself, and cannot be set up in the answer under Rule 39, as an answer is an appearance and a waiver of a plea to the jurisdiction. *Voss v. Reed, et al.*, 647

See PRACTICE IN EQUITY, 12, 18, 19, 20, 21, 22, 23, 36, 37, 38, 40, 46, 73, 74

POLICY. See LIFE INSURANCE, 4, 5.

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### POLITICAL QUESTION.

The question, as to whether the adoption of the constitution of the state of Georgia of 1868 was the act of the people of the state, is a political one, in which the courts must follow the action of the political department of the government. *Marsh et al. v. Burroughs et al.*, 468

POSSESSION. See LIMITATIONS, 3, 4.

### POSSESSORS.

1. Persons not possessors in good faith of lands sued for and recovered are liable in Louisiana for rents and profits and are not entitled to compensation for improvements. *Gaines v. Lizardi*, 56
2. Where the possession is in bad faith, the possessor will not only be charged with what he has received, but with what he might have received; in other words, with the worth or value of the property. *Gaines v. New Orleans*, 104
3. Possessors in bad faith cannot, by the law of Louisiana, claim the benefit of prescription with regard to rents and profits, any more than with regard to the land itself. *Ib.*
4. Under the law of Louisiana, possessors in bad faith are entitled to compensation for improvements which they have erected, if accepted by the owner. The latter may require them to be removed. *Ib.*
5. Manner of estimating rents and profits on lands, buildings and draining machine in possession and use by the city of New Orleans. *Ib.*

See LIMITATIONS, 3, 4.

### POWERS.

1. A collateral power, although irrevocable, expires with the life or bankruptcy of the appointor; otherwise is case of a power coupled with an interest. *Lockett v. Hill et al.*, 552
2. In Georgia a mortgage is merely a security for a debt and passes no title, estate or interest to the mortgagee. Therefore a power of sale in a mortgage is not in Georgia a power coupled with an interest, but is merely a collateral power. *Ib.*
3. It follows that in Georgia a power of sale contained in a mortgage cannot be executed after the mortgagor has been adjudged a bankrupt. *Ib.*
4. In Georgia possession by a mortgagee of the mortgaged premises as tenant at will or at sufferance is not a possession of such dignity as will, in connection with a power of sale granted to the mortgagee, create a power coupled with an interest. *Ib.*
5. Where the power granted to a mortgagee to sell the mortgaged premises is limited to a specified time, if the mortgagee fail to execute it within that time, the power is forever gone. *Ib.*
6. A mortgagee with a power to sell cannot himself become the purchaser, either in severalty, joint tenancy or otherwise. The relations of vendor and vendee cannot thus be united in the same person. Thus, where a mortgage with power of sale was made to an individual, he could not execute the same by selling the mortgaged property to a firm of which he was a member. *Ib.*

7. A mortgagee with power to sell is, in Georgia, a trustee for the mortgagor, his heirs, etc., and as such is accountable in equity; and this, although the power may not be regarded as collateral, but as coupled with an interest. *Ib.*

PRACTICE. See APPEAL, 7. CONFISCATION, 6, 7, 8, 10. PRACTICE IN EQUITY. PRACTICE AT LAW.

### PRACTICE AT LAW.

1. Where the supreme court of a state gave judgment for a perpetual injunction against defendants, and they sued out a writ of error to the supreme court of the United States, and within ten days gave bond in the sum of \$10,000 to supersede the judgment of the state court; a justice of the United States supreme court refused, on motion, to require plaintiffs in error to give an additional bond with a larger penalty, although satisfied that the bond already given was not sufficient to cover the fees and emoluments claimed by defendant in error, which would come to the possession of the plaintiff in error by reason of the *supersedeas* of the judgment of the state court. *Butchers' Association v. Slaughter House Company.* 50
2. As soon as a writ of error from the United States supreme court is applied for and allowed, the jurisdiction of that court attaches and supersedes any further action of a justice of that court at chambers. *Ib.*
3. It seems to be the settled understanding of the courts of the United States that both appeals and writs of error operate as a *supersedeas* without any express order to that effect, if taken within the proper time and with an offer of the requisite security. *Ib.*
4. If a claimant of land, or property seized on land, contests the material facts alleged in the libel of information, the issue is to be tried by a jury. *The Confiscation Cases,* 221
5. When land or property on land is seized and libelled for condemnation, and no answer is filed, judgment by default may be taken, and the court may proceed to ascertain the material facts in the case *ex parte* and without jury. *Ib.*
6. If in the copy of a writ of error, lodged with the clerk of the court for the defendant in error, the return day of the writ is correctly stated, and the record be actually returned and filed in due time, a mere clerical error in the return day, in the original writ, is immaterial and is cured. *United States v. Six Lots of Ground,* 243
7. A district court of the United States cannot, three years after rendering a decree in a confiscation case, sit as a court of error upon its own decree and reverse it. *Ib.*
8. When want of jurisdiction appears upon the face of the pleadings, the objection should be taken by demurrer, when it does not so appear by plea. *Varnor v. West,* 493
9. An averment in a declaration that a party defendant is a citizen of the southern district of Alabama is equivalent to an averment that he is a citizen of the state of Alabama, and is a sufficient averment of the latter fact. *Berlin & Son v. Jones,* 638

See ACTION AT LAW, 1, 2, 3, 4. CONFISCATION, 1, 2. JURORS. MOTION. REMOVAL OF CAUSES.

## PRACTICE IN EQUITY.

1. The decision of the supreme court of the United States in the cases of *Gaines v. Lizardi*, *Same v. New Orleans*, and *Same v. De La Croix*, did not authorize this court to enter a decree for complainant against defendants for the proceeds of lands which were in their possession, but which they had sold before the filing of the bills in these cases. *Gaines v. Lizardi*, 56
2. The rule of practice is, that no exceptions to a master's report will be heard by the court, which have not been made before the master; and in the absence of very special circumstances, the court will feel bound to enforce it. *Gaines v. New Orleans*, 104
3. Unless some particular matter is pointed out in which the master has committed an error, or unless it be shown that he has adopted some erroneous principle on which his account or calculation is based, his report will be allowed to stand. *Ib.*
4. If, in a case in equity, any circumstances exist which render it improper or inequitable to carry on proceedings in the court, they can always be brought to the notice of the court by motion or petition in the suit; or may be pleaded in bar or abatement. A formal bill for the purpose is needless litigation. *Puentes v. Gaines*, 112
5. The United States courts in attempting to administer state laws must do so fairly, so as to secure to suitors all their just rights under those laws; otherwise, they may be the means of much injustice and oppression. *Ib.*
6. When, in a chancery suit in the U. S. courts, a question of title to property is involved in the validity of a will, parties to the suit who are not barred by prescription, waiver, estoppel or some other supervening cause, may contest its validity by answer, or by proceedings in the court of probate for a revocation of the probate, or in both methods. *Ib.*
7. If evidence of defendant's title furnishes evidence of the complainant's, the latter may compel a discovery of it. *Gaines v. Mausseau*, 118
8. The fact that in Louisiana titles are registered in a public office does not affect complainant's right to call for such discovery. *Ib.*
9. A bill is not objectionable for multifariousness because it joins defendants holding distinct tracts of land, under distinct conveyances, if the main ground of defense is common to all the defendants. *Ib.*
10. If fraud is charged against executors in proving a will, and acting under it, and notice of such fraud before their purchase of the property is alleged against the other defendants, a suit at law could not give adequate relief. *Ib.*
11. If a plea contain matter proper for a demurrer, for a plea in bar, for a plea in abatement, and for an answer, it is bad for duplicity. *Ib.*
12. An executor may bring a bill to protect the property of the estate, of which he is executor, from sale on execution issued on a judgment against himself personally, without joining the legatees or other persons entitled to the estate after payment of the debts. *Labitut v. Prescott*, 144
13. Defendant in equity has no right as a matter of course to file more than one plea. But when great inconvenience might otherwise result in a particular case, the court will sometimes in its discretion allow several pleas. *Noyes v. Willard*, 187

14. Where a defendant in equity has filed several pleas without leave of the court, he will be put to his election as to which he will stand upon. *Ib.*
15. In general when a defendant insists by plea upon matter which is apparent on the face of the bill and might be taken advantage of by demurrer, the plea will not hold. *Ib.*
16. Where want of jurisdiction appears upon the face of the bill, the objection should be taken by demurrer. *Ib.*
17. The well known rule of chancery pleading, that if a defendant submits to answer, he shall answer fully to all matters of the bill, is abrogated, in cases where the defendant might by plea protect himself from such answer and discovery, and in his answer sets forth the matter of such plea as a bar to the merits of the bill, by the 39th rule in equity established by the supreme court of the United States. *Gaines v. Agnelly,* 238
18. Under the old equity practice, if a plea in bar was filed, and issue taken upon it, and that issue decided in complainant's favor, he was entitled to a decree without proving the allegations of his bill. If the same matters were set up in an answer, he was obliged to prove his bill; but in aid of such proof he was entitled to defendant's answer to the whole bill. *Ib.*
19. The new rule in equity practice (the 39th) which allows a defendant to set up a bar in his answer, and excuses him from answering further, still leaves the complainant under the burden of proving his bill, and takes from him the benefit of the defendant's answer; but the defendant is liable to be called as a witness in the cause. *Ib.*
20. Under the new rule in equity, 39th, where the answer sets up a bar to the whole bill, and claims the benefit of it, as a plea in bar, it is no longer a ground of exception, that it does not fully answer the allegations of the bill. *Ib.*
21. If the bar set up in the answer and claimed as such be insufficient, or if it be unsupported by proper averments, or by a proper answer to rebut allegations of the bill repugnant to the bar, the complainant may except for insufficiency, set the cause down on bill and answer only, or file a replication and proceed to proofs according to the exigencies of the case. *Ib.*
22. If the bar set up in the answer be insufficient as such, the complainant would be entitled to except as for want of a full answer; and to avoid answering the exceptions, the defendant in such case would require leave of the court before he could amend the bar. If instead of excepting, the complainant should go to proof, the burden would be on him to prove his bill, and on the defendant to prove his bar; each being entitled to examine the other as a witness. If however, he should set the cause down for hearing on bill and answer only, the answer would have to be taken as true, and the bar therein as proved; and though insufficient as a defense, the complainant could not have a decree, unless the answer admitted the allegations of the bill on which the prayer for relief was founded. *Ib.*
23. If the bar set up in the answer is a sufficient defense to the whole relief sought by the bill, it is immaterial whether the defendant answer the allegations of the bill or not. He is not bound to answer them; and the rule no longer applies that if the defendant does answer at all, even on matters outside the bar, he must answer fully. *Ib.*
24. Where an executor has qualified and given bond for the faithful discharge of his trust, and taken possession of the property of the estate

- by virtue of the provisions of the will, a strong case must be made against him to induce the court to appoint a receiver to take the possession of the property from him. *Haines v. Carpenter, Ex'r*, 262
25. The application for a receiver must be supported by evidence showing that the appointment is necessary. *Ib.*
  26. The verification by complainant of a bill stating upon information and belief, grounds for the appointment of a receiver, is not of itself such evidence as would justify the appointment by the court. *Ib.*
  27. In an application to discharge a trustee, and for the appointment of a receiver for the trust estate, it must be made to appear that the property is in danger and that the trustee is irresponsible. *Ib.*
  28. When the accounts of a receiver are referred to a master for report, no exceptions thereto will be considered by the court unless first made before the master. *Oowdrey v. The Railroad Co.*, 331
  29. This rule would not, however, deter the court from directing an account to be reformed which contained manifest errors, or clearly improper charges. *Ib.*
  30. A receiver is an officer of the court as well as the master, and states his own accounts and submits them to the master for inspection, under the order of the court, the master acting in place of the court in a judicial rather than ministerial capacity. *Ib.*
  31. Exceptions to the master's report do not lie in such cases. Nevertheless, if the master adopt any erroneous principle in allowing a receiver's account, the court, on petition, will refer the matter back to him for correction. *Ib.*
  32. When a report upon a receiver's account is submitted by a master, the duty of the court consists in reviewing the principles and rules adopted by the master in allowing the accounts, rather than in examining the items in detail, or the evidence on which they are founded. *Ib.*
  33. Except in extraordinary cases, the submission by the receiver, at frequent intervals, of his accounts to the master, giving the latter an opportunity to disallow whatever he may not approve, will be regarded as a sufficient reference to the court for its ratification of the receiver's proceedings. *Ib.*
  34. The question of allowance to the receiver for his services is one that properly belongs to the master's office, and not to the court. *Ib.*
  35. It is not necessary that all the holders of the bonds of a railroad company should be made parties to a bill of foreclosure brought by the trustees of a mortgage by which the bonds are secured. *Campbell v. The Railroad Co.*, 368
  36. Where there are trustees of successive mortgages, and the trustees of a prior mortgage file a bill to foreclose the same, all the bondholders under a subsequent mortgage need not be made parties to the suit in order to make the proceedings valid and binding on all. *Ib.*
  37. Where the bondholders secured by a mortgage on a railroad are numerous, it is not necessary to make all of them parties to a suit, or to make any of them parties, if their trustees are parties. *Ib.*
  38. In a case where the parties are numerous, a suit brought by or against some in behalf of all will be binding on all. The parties who are not named may intervene and make themselves actual parties, so long as the proceedings are *in fieri*, and are not definitely closed by the course and practice of the court. *Ib.*

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39. Bondholders secured by a mortgage, if aggrieved by a decree rendered in a suit to which the trustee of the mortgage was a party, can intervene and become actual parties, and then make such application to the court for relief as is competent for parties to make in the same suit; or they may institute such other auxiliary, revisory or supplemental proceedings as a party to the suit might institute. *Ib.*
40. A bill of review may be conjoined with a bill for relief against a fraudulent decree. *Ib.*
41. Where complainants are allowed to dispense with parties on account of their numerousness, any one of whom would have the right to come in by petition, such complainants ought to proceed in the utmost fairness and good faith in procuring a final decree which is to be binding on all. *Ib.*
42. Land was conveyed to a grantee, the vendor retaining a vendor's lien for a part of the purchase money. The grantee conveyed to a trustee who took the title in trust for a joint stock company, and went into possession. The original vendor prosecuted a proceeding to foreclose his vendor's lien without making the trustee a party. *Held*, that the right of the company to redeem was not foreclosed, and that the proper party to file a bill to redeem would be the trustee. But when the trustee had been removed and the directors of the company had failed to appoint a new trustee, the stockholders might file a bill to redeem. *King v. The Young Men's Association*, 386
43. The receiver of the property and effects of a railroad corporation appointed by a court of equity, represents the creditors of the corporation, and in a suit brought by the receiver to protect the property of the company, the receiver represents the creditors and they are neither proper nor necessary parties. *Davis v. Gray*, 420
44. In the United States equity courts, a bill will not be dismissed for want of equity, except on the final hearing, unless the objection be taken by demurrer. *La Vega v. Lapsley et al.*, 428
45. Under the 68d rule of equity practice, exceptions to an answer for insufficiency must be set down on a rule day for hearing before a judge of the court. A reference of such exceptions on a day not a rule day, and to a master instead of a judge of the court, is, unless cured by some subsequent action of the court, a nullity, and is an abandonment of the exceptions. *Ib.*
46. If a decree be satisfied, the execution should be arrested on motion, without a new bill. *Molyneaux's Adm'r v. Marsh*, 452
47. Where several persons are liable for the same debt, each one is entitled to know what amount of money the creditor has received; and for such purpose may cite the creditor to a discovery, by complying with the rules in such cases. Should the creditor refuse to make the disclosure, he will be liable to the costs of a bill of discovery. *Ib.*
48. If a bill does not contain specific interrogatories, the complainant must be satisfied with such answer to its allegations as would fairly occur to the professional mind as meeting them in a substantial manner. *Parsons et al. v. Cumming et al.*, 461
49. Defendant is not bound to exercise ingenuity in finding out all the aspects in which a statement in a bill may be taken. *Ib.*
50. A general answer is sufficient for a general allegation. *Ib.*
51. Under the act of congress parties can be called to the stand and be examined on oath, and be compelled to answer every possible interrogatory that can be deemed at all material to the case. *Ib.*

52. If it is apparent that defendant has omitted to answer any material allegation, or has evaded giving an answer, or has answered disingenuously, the court will compel another answer. *Ib.*
53. Where discovery is a principal object, distinct interrogatories should be affixed to the bill. *Ib.*
54. In case a fund can only be divided satisfactorily amongst a certain class of persons, it is necessary to frame the decree in such a manner as that all those persons may be brought in for their distributive shares; but even then the bill may often be filed by any one of them on his own behalf. *Marsh et al. v. Burroughs et al.*, 463
55. It is only when it appears that a distribution of such fund must be made, that a decree will be entered for the benefit of all. *Ib.*
56. A judgment creditor, who has exhausted his legal remedy, may pursue in a court of equity any equitable interest, trust or demand of his debtor, in whosoever hands it may be. If a party thus reached has a remedy over against others for contribution or indemnity, it will be no defense to the primary suit against him, that they are not parties. *Ib.*
57. When a judgment creditor of a bank has exhausted his remedy at law, and seeks in equity to enforce payment of stock subscriptions, the stockholders cannot go behind the judgment rendered against the bank and question the original cause of action, unless they can show collusion between the creditor and the bank, for the purpose of defrauding them. *Ib.*
58. An executor or administrator is the trustee and proper representative of all persons interested in the personal estate, and until the final distribution of the estate, holds both the legal and equitable title thereto. *Alston v. Cohen*, 487
59. Consequently, when he is made a party to a bill filed by a distributee to sell the personal property of an estate and divide its proceeds, the other distributees are not necessary parties. *Ib.*
60. Under the 39th equity rule, when a defendant sets up in his answer the bar of the statute of limitations, and the same is well pleaded, he is thereby excused from further answer to such parts of the bill as are covered by it. *Samples v. The Bank*, 523
61. When a creditor's bill is filed in the state court, under the laws of Georgia, to settle a trust, all creditors notified of the bill according to law are parties and bound by the decree. *Ib.*
62. In Georgia, when the United States marshal levies an execution against A., upon the real estate of B., and threatens to sell the same, B. must file his bill in equity to stop the sale, and cannot resort to the "claim law" of the state for relief. *Hall v. The Mining Company*, 544
63. Under the statutes of the United States in actions against executors, administrators or guardians, "neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court." An *ex parte* order, obtained by complainant before process issued for his own examination as a witness, does not qualify him as such on the ground that he is required by the court to testify. *Eslava v. Mazange's Adm'r et al.*, 623
64. The reservation of power in the court to require the evidence to be taken was made in order to provide for such extreme and special cases as might arise, in which it would be a great hardship not to take it. *Ib.*

65. Where a bill was filed to set up a parol trust in real estate against the heirs and administrators of a deceased person, and an execution creditor of the complainant who had levied on the property was made a defendant, and had filed a cross bill, such execution creditor cannot be considered as "the opposite party," referred to in the act of congress, who is authorized to call the complainant as a witness. The "opposite party" is that party against whom the evidence is sought to be used. *Ib*
66. In such a case the evidence of the party cannot be taken and admitted under the 70th equity rule, on the ground that the witnesses are old and infirm. This rule was not originally intended for the examination of a party, and it is doubtful whether it ought ever to be extended to the case of a party propounding himself as a witness. *Ib*.
67. In equity, orders obtained upon motion may be discharged upon motion, and orders obtained *ex parte* may be thus discharged when they have never been assented to by the other party. *Ib*
68. A motion to suppress depositions fairly brings up the regularity of an order directing them to be taken, as well as the competency of the witnesses examined, if the party moving to suppress has never waived the objection. *Ib*.
69. When complainants and some of the defendants are citizens of the same state, the United States circuit court has no jurisdiction of the cause. In such a case the citizenship of the parties being disclosed by the bill and no objection to the jurisdiction having been made *in limine*, complainants may dismiss their bill as to the obnoxious defendants and hold it as to the others. *Lockhart v. Horn*, 628
70. A plea to the jurisdiction of the court must be pleaded by itself, and cannot be set up in the answer under Rule 89, as an answer is an appearance and a waiver of a plea to the jurisdiction. *Vose v. Reed et al.*, 647
71. There is no doubt of the power of the court, as a court of equity, to award attachments for contempt in vacation. As an equitable tribunal, the court is always open. *Ib*.
72. Where parties have been guilty of a technical contempt, in violating an injunction, but declare on oath, that they were not aware of the violation, and submit to the direction of the court, they will be allowed to purge the contempt by undoing or reversing their acts, when it is practicable to do so. *Ib*.
73. When a cause in equity is submitted for final decree upon the pleadings and evidence, and it turns out that no replication has been filed to the answers, but that the evidence has been taken as if it had been filed, the court will try the case on its merits, notwithstanding the want of replication, or allow one to be filed instanter. *Jones et al. v. Brittan et al.*, 667
74. If, after objection is made to a bill in equity for want of necessary parties, the complainant neglects or refuses to bring them before the court, the bill will be dismissed. *Ib*

See MULTIFARIOUSNESS.

PREScription. See LIMITATIONS.

PRIVILEGES AND IMMUNITIES OF CITIZENS. See CONSTITUTIONAL LAW, 1 2, 3, 4, 5, 6, 7, 9, 14, 15, 16, 24, 25, 27.

PROCESS AT COMMON LAW. See ADMIRALTY, 6, 7, 8. BANKRUPTCY, 11.

**PROMISSORY NOTES.** See NOTES AND BILLS.

**PURCHASER.** See BONA FIDE PURCHASER.

### REBELLION.

1. Letters of credit given to a confederate agent to enable him to prosecute his mission abroad in aid of the confederate government are to be considered as given in aid of the rebellion, and void. *The Confiscation Cases*, 221
2. Loans made by a Frenchman in Paris to a confederate agent, unless knowingly made for the express purpose of carrying on hostilities against the United States, are to be regarded as made by an innocent neutral, and valid. *Ib.*
3. The rights of a government against its own citizens in rebellion are not less but rather greater than those it may exercise towards a foreign enemy. *Ib.*
4. An act of the insurrectionary legislature of Georgia abolishing the vendor's lien is valid and binding. *Cook v. Oliver, Assignee*, 437
5. The judgment of a court of a state in insurrection, merely settling the rights of private parties actually within its jurisdiction, not tending to defeat the just rights of citizens of the United States, nor in furtherance of laws passed in aid of the rebellion, is valid. *Ib.*
6. Acts of the legislature of Georgia which show upon their face that they were passed in furtherance of the rebellion are void. *Hatch v. Burroughs*, 439
7. All transactions, judgments, and decrees which took place in conformity with existing laws in the Confederate States, between citizens thereof during the late war, except such as were directly in aid of rebellion, are good and valid; but those in aid of the rebellion are void. *Lockhart v. Horn*, 628
8. A deposit by an executor of a large sum of money, belonging to the estate, in the Confederate States depository, was a direct contribution to the resources of the Confederate States government, and the executor was refused a credit therefor in the settlement of the estate. *Ib.*
9. Where an executor might have collected the assets of the estate in good money before the war, but failed to do so, he was not allowed to discharge the balance found due from him, by payment in confederate treasury notes. *Ib.*

See CONTRACTS, 5. NOTES AND BILLS, 1. REVOLUTIONARY GOVERNMENT.

### RECEIVER.

1. Where an executor has qualified and given bond for the faithful discharge of his trust, and taken possession of the property of the estate by virtue of the provisions of the will, a strong case must be made against him to induce the court to appoint a receiver to take possession of the property from him. *Haines v. Carpenter, Ex'r*, 262
2. The application for a receiver must be supported by evidence showing that the appointment is necessary. *Ib.*
3. The verification by complainant of a bill stating upon information and belief, grounds for the appointment of a receiver, is not of itself such evidence as would justify the appointment by the court. *Ib.*

4. In an application to discharge a trustee, and for the appointment of a receiver for the trust estate, it must be made to appear that the property is in danger and that the trustee is irresponsible. *Ib.*
5. All outlays of the receiver of a railroad intrusted with its management and operation, made in good faith, in the ordinary course, with a view to advance and promote the business of the road and make it profitable and successful, are fairly within the line of the discretion necessarily allowed him. *Cowdrey v. The Railroad Co.*, 881
6. In extraordinary cases, involving a large outlay of money, the receiver should always apply to the court in advance for authority to make the purchase or improvement proposed. *Ib.*
7. A receiver is an officer of the court as well as the master, and states his own accounts and submits them to the master for inspection, under the order of the court. *Ib.*
8. The receiver's expenses for counsel and witness fees, incurred in resisting a motion for his removal, allowed as a charge against the trust fund when it appeared that he had acted in good faith and with integrity of purpose, and when it further appeared that there were apparent grounds for the motion. *Ib.*
9. The question of allowance to the receiver for his services is one that properly belongs to the master's office and not to the court. *Ib.*
10. When there is nothing in the administration of the trust to convict the receiver of want of integrity or good faith, want of foresight in regard to the future developments of business is no reason for denying him compensation or reducing its amount, especially when the trust has been administered with reasonable success. *Ib.*
11. What another, even competent, person would have done the work for, is not the proper rule in fixing the compensation of a receiver. It is to be graduated somewhat by the duties, and somewhat by the responsibilities of the office. *Ib.*
12. Defendants, in a suit in equity to foreclose a mortgage on a railroad, agreed with complainants that on giving security in the sum of \$350,000, they should have possession of the road and name the receiver, and the bond was given according to this agreement, and one of complainants appointed receiver: *Held*, that defendants could not object to such receiver unless he committed some act of unfaithfulness to his trust, and the court refused a motion to discharge the receiver, the evidence failing to show any want of faithfulness on his part since his appointment. *Ib.*
13. While the principal cause was pending in the supreme court of the United States, the circuit court refused to authorize the receiver to make any radical change in the condition of the railroad property by purchasing the bridge across Galveston Bay, or by building or contracting to use a new junction road through the city of Houston. *Ib.*
14. The receiver of the property and effects of a railroad corporation appointed by a court of equity represents the creditors of the corporation, so that in a suit brought by the receiver to protect the property of the company, the creditors are neither proper nor necessary parties. *Davis v. Gray*, 420
15. The appointment of a receiver to take and preserve a trust fund is the exercise of a discretion in which all the circumstances are to be taken into consideration. Where the funds are in the hands of trustees, appointed by the legislature, who hold their trust *ex officio*, as high public officers of the state, and especially where one part of

the trust involves duties of a public character, the court will be very reluctant to take the fund out of their hands, and will not do so except for the most cogent reasons, such as gross fraud and imminent danger of the trust fund. It will resort to every coercive means of compelling the trustees to perform their duty before resorting to this extreme measure. *Voss v. Reed et al.*, 647

16. A receiver in possession of mortgaged premises under order of a state court of chancery, in proceedings for foreclosure, prior to commencement of proceedings in bankruptcy, cannot be dispossessed by order of the district court in the bankruptcy proceedings. *Davis et al. v. The Railway Co. et al.*, 661
17. Such possession is a lawful one under a specific and vested lien, and only be interfered with by the assignee in bankruptcy by payment and redemption of the mortgage. *Ib.*
18. To deprive a man of his just possession under a specific lien would involve a sacrifice of his rights. *Ib.*

See BANKRUPTCY, 80.

#### RECORD OF DEEDS.

It was a general practice throughout Texas, though not required by law, to record deeds and mortgages in separate record books: *Held*, that when a deed was recorded in the book for the record of mortgages, such record was irregular, and imposed no legal or constructive notice on third persons. *King v. The Young Men's Association*, 386

#### REMOVAL OF CAUSES.

1. The act of congress of 1867, which authorizes the removal of suits from a state court to the U. S. courts either by the plaintiff or the defendant, who shall make oath that he cannot have a fair trial on account of local prejudice and influence, overrides the provision of the 11th section of the judiciary act, which declares that those courts shall not have cognizance of any suit to recover the contents of any note or other chose in action in favor of an assignee, unless suit might have been prosecuted in such court to recover said contents, if no assignment had been made. *Barclay v. The Levee Commissioners*, 254
2. An action on the case, begun in a state court, to recover damages for alleged slanderous words spoken by a United States collector of customs, while in the discharge of his official duty and explanatory of it, can be properly removed to the United States circuit court under the provisions of the "force act," approved March 2, 1833. *Buttner v. Miller*, 620

See JURISDICTION, 7.

RENTS AND PROFITS. See POSSESSORS, 1, 2, 3, 5.

RESIGNATION. See BANKRUPTCY, 31.

#### REVIEW.

The judgment or order of a court finally disposing of a case, cannot be reviewed at a subsequent term on motion. The only relief for errors in law in such cases is by review, writ of error or appeal, as either may be appropriate. *The Bank v. Labitut*, 11

See BANKRUPTCY, 4, 5.

REVOLUTIONARY GOVERNMENT.

1. When the insurgent government of the state of Alabama undertook, through its officers and laws, to appoint a guardian for the estate of an infant situate within its territory, its act was as valid and lawful as if done by a government *de jure*. *Van Epps v. Walsh et al.*, 598
2. The decrees of the courts of a revolutionary and insurgent government, enforcing laws passed in support of rebellion against the lawful government, and intended to defeat the just rights of its citizens, are void. *Ib.*
3. The legislature of the insurgent state of Alabama, having passed December 5, 1861, an act authorizing guardians to invest the estate of their wards in confederate bonds, and A., the guardian of B., having so invested the estate of his ward, and having, on a settlement with the probate court, made during the war, received a credit for the confederate bonds, and at the time of such settlement, his ward being within the federal lines: *Held*, that the settlement was not binding upon the ward, and the guardian was not entitled to credit for the confederate bonds. *Ib.*
4. A decree of the court of chancery of the insurgent government of Alabama, made during the war, affecting the rights of a party who was at the time of the decree in the state of New York, is void. *Ib.*
5. An act of the insurrectionary legislature of Georgia abolishing the vendor's lien is valid and binding. *Cook v. Oliver, Assignee*, 437
6. The judgment of a court of a state in insurrection merely settling the rights of private parties actually within its jurisdiction, not tending to defeat the just rights of citizens of the United States, nor in furtherance of laws passed in aid of the rebellion, is valid. *Ib.*
7. Acts of the legislature of Georgia which show upon their face that they were passed in furtherance of the rebellion are void. *Hatch v. Burroughs*, 489
8. All transactions, judgments and decrees which took place in conformity with existing laws in the Confederate States, between citizens thereof during the late war, except such as were directly in aid of the rebellion, are good and valid, but those in aid of the rebellion are void. *Lockhart v. Horn*, 628

See BOND. CONFISCATION, 18. REBELLION, 4, 5, 6, 7, 8, 9.

SAILING REGULATIONS. See ADMIRALTY, 22.

SALE. See AUCTION SALE. BANKRUPTCY, 12, 30. JUDICIAL SALE. JUDGMENT.

SALVAGE.

1. A low rate of salvage should be allowed where the salvors in good weather simply towed a vessel disabled, but in no immediate danger, a distance of thirty miles to a safe anchorage, but incurred no risk of life or property, and no deviation from their ordinary pursuits. *The Bolivar v. The Chalmette*, 397
2. When a disabled vessel needed towage only, and her officers applied therefor to a tug, which refused towage and insisted on taking her chances as a salvor, and this was not prevented by the officers of the disabled ship; *held*, that these circumstances tended to reduce the grade of salvage allowance. *Ib.*

**SEAMAN.** See ADMIRALTY, 9, 20, 21, 23, 24. CONTRACTS, 8. STATUTES CONSTRUED, 11.

**SEAWORTHINESS.** See ADMIRALTY, 10, 11, 12.

**SEIZURE UPON LAND.** See ACTION AT LAW, 1. CONFISCATION, 2.

**SHIPS AND STEAMSHIPS.** See ADMIRALTY, 2, 5, 6, 7, 10, 11, 12. STATUTES CONSTRUED, 7.

### SIC UTERE TUO UT NON ALIENUM LÆDAS.

When divers persons have divers interests in the same thing, neither has a right to do what will injure the others; and each must submit to judicial restraint imposed for the protection of the others' interests.  
*Goddard v. Weaver,* 257

**SOLDIER.** See DUTY OF A SOLDIER.

**SOLICITOR.** See BANKRUPTCY, 12.

**SPECIFIC PERFORMANCE.** See EQUITY, 4.

**STATE COURTS.** See DECISIONS OF STATE COURTS WHEN BINDING ON FEDERAL COURTS, 1, 2. BANKRUPTCY, 1, 2, 8, 10, 11, 16, 17, 18, 19.

### STATUTES CONSTRUED.

1. The proviso in the revenue act, passed by the legislature of Louisiana March 16, 1870, that "no insurance company whose license tax shall be one thousand dollars, shall be liable to any assessment throughout the state other than that imposed by this article," applies only to taxes levied by the state, and does not prohibit taxation of such company by the city of New Orleans. *The Insurance Co. v. The City of New Orleans,* 85
2. Under section 16 of the act (16 Stat., 262), C. imported a lot of wine in bottles, each bottle containing more than a pint and less than a quart; *held,* that the rate of duty was controlled by the actual cost of the wine and not by its cost estimated on the supposition that each bottle contained an entire quart. *Cavaroc v. The Collector,* 172
3. An act of the legislature of Mississippi provided that it should be lawful to convey by way of mortgage or deed of trust any crop of cotton, etc., being produced or to be produced within fifteen months. *Held,* that a mortgage executed before the passage of this act on a crop to be produced in the future was valid, the enactment being merely declaratory of what the law was before its passage, adding a limitation that the crop must be produced within a given time. *Allett v. Butt et al.,* 214
4. Under the act of March 8, 1821 (3 Stat., 648), the deputy clerk of the U. S. district court for Louisiana was authorized to sign process in his own name as such deputy, and a *conditioi exponas* so signed and in other respects regular, and under the seal of the court, is valid. *Bragg v. Lorio,* 209
5. The provisions of the 11th section of the judiciary act in regard to suits in the U. S. courts on notes or other choses in action, held by

- assignment, was intended to prevent fraudulent assignments of choses in action, made for the purpose of giving the court jurisdiction; and was not founded on any constitutional principle. *Barclay v. The Levee Commissioners*, 254
6. Where the purpose of a bill in equity is not to obtain possession of a particular thing bequeathed, but to establish the validity of the bequest, a demand for the particular legacy is not a necessary preliminary to the suit, under art. 1626 of the Code of Louisiana. *Haines v. Carpenter, Ex'r*, 262
7. The penalty for a violation of the 4th section of the act approved Feb. 28, 1871 (16 Stat., 440), which forbids a steamer engaged in carrying passengers from carrying as freight any burning and explosive fluid, cannot be recovered by a proceeding *in rem*. An action of debt against the offending parties is the proper action. *United States v. The O. B. Church*, 275
8. An incorporated company, whose business is to make gain by compressing cotton, is not required to pay a tax on its dividends by sec. 120 of the act of June 30, 1864. (18 Stat., 283.) *Cotton Press Co. v. The Collector*, 296
9. On the trial of a libel for the forfeiture of certain goods imported into the United States, because the vessel had no manifest of her cargo on board, it was shown that no part of the cargo had been unshipped after it was taken on board, and that a manifest had been delivered to the master by the consignors on the day the vessel cleared, but had been inadvertently lost by him before the ship sailed; *held*, that the case fell within the proviso of the 24th section of the act of March 2, 1799 (1 Stat., 646), and that the goods ought not to be condemned. *United States v. Certain Cigars*, 306
10. The civil rights act was intended to give to the colored race the rights of citizenship, and to protect them, as a race or class, from unfriendly state legislation and from lawless combinations. An injury to a colored person, therefore, is not cognizable by the United States courts under that act, unless inflicted by reason of his race, color or previous condition of servitude. An ordinary crime against a colored person, without having that characteristic, is cognizable only in the state courts. *United States v. Cruikshank*, 308
11. The forty-third section of the act approved February 28, 1871 (16 Stat., 458), which gives any person sustaining loss or injury through the carelessness, negligence or willful misconduct of any of the officers of a vessel, or their refusal or neglect to obey the provisions of law, a remedy against such officers, does not preclude a mariner from proceeding against the vessel for damage suffered by himself in consequence of such neglect or misconduct. *Brown v. The D. S. Cage and owners*, 401
12. The act of congress approved June 11, 1864, which suspends the running of the statute of limitations during the rebellion is not of itself a statute of limitations. *Graydon v. Sweet*, 418
13. Article 12 of the constitution of Texas, which declares that "the statutes of limitation of civil suits were suspended by the so called act of secession of January 28, 1861, and shall be considered as suspended within this state until the acceptance of this constitution by the congress of the United States," does not conflict with the said act of congress. *Ib.*
14. The act of congress entitled "an act to admit the states of North Carolina, etc., to representation in congress," passed June 25, 1868, did

not attempt to reenact the constitutions of the states, but merely recognized the fact that they had been adopted by the people, and that the states were entitled to representation in congress. *Hatch v. Burroughs*, 439

15. The statute of Georgia, of the 14th of December, 1861, suspending the statutes of limitation then in force during the then existing war, and suspending the statutes in cases where they had commenced to run, until peace should be declared; and the ordinance passed by the convention of the people on the 31st of October, 1865, suspending the statutes of limitation in all cases, civil and criminal, from the 19th of January, 1861, until civil government should be restored or the legislature should otherwise direct, however defective they may have been in point of original authority, were ratified by the constitution of the state of 1868. *Davis v. Hatcher, Executrix*, 456
16. The act of March 16, 1869, passed by the general assembly of Georgia, established under the constitution of 1868, declaring that all acts of the legislature of the state, and all ordinances of the conventions of 1865 and 1868, which have the force and effect of law, and which are retroactive in their character relative to the statutes of limitation, should be held null and void in all cases in which the statute had fully run before the passage of said retroactive legislation, does not control or modify the operation of those suspensory laws of 1861 and 1865, except in cases where the statute had fully run before their passage respectively. *Ib.*
17. The act of congress of July 20, 1840 (5 Stat., 894), prescribing how jurors in courts of the United States shall be designated, does not require a minute adherence to the state practice on that subject by the United States courts. *The United States v. Collins*, 499
18. It is not necessary, under said act, for the United States courts to employ state officers to perform for them any part of the duty of designating jurors. They may and should impose that duty entirely on their own officers. *Ib.*
19. The law of Georgia required that the names of jurors should be taken from the book of the receiver of tax returns; *held*, that this requirement was not binding on the courts of the United States. Those courts were only required to take care that their jurors had the same qualifications as jurors in the state courts. *Ib.*
20. A rule of the United States court for the southern district of Georgia, which prescribed that the names of five hundred persons, having the qualifications of jurors under the state law, should be selected from the body of the district by the marshal and clerk and three United States commissioners, to be designated by the court, and that the names of grand and petit jurors should be drawn from such list by the marshal and clerk, by lot, is in substantial accord with the law of Georgia prescribing how jurors shall be selected, and is a compliance with the act of congress on the subject. *Ib.*
21. The sixth section of the act of the legislature of Georgia approved March 16, 1869, entitled "an act in relation to the statute of limitations and for other purposes" applies to a suit founded on the notes of a suspended bank. *Samples v. The Bank*, 523
22. The "claim law" of Georgia, so far as the same applies to real estate, provides for equitable relief. It is therefore a remedy which cannot be administered in the federal courts, and is not prescribed to be used therein by the act of congress, approved June 1, 1872, entitled "an act to further the administration of justice." (17 Stat., 197.) *Hall v. The Mining Company*, 544

23. The suspension of the statute of limitations provided for by the act of congress approved June 11, 1864 (13 Stat., 123), did not continue in Georgia after the proclamation of the president of April 2, 1866. *The United States v. Muhlenbrink*, 569
  24. The fact that no term of the United States court for the northern district of Georgia was held until September 10, 1866, and no clerk of that court appointed until that date, did not continue the suspension of the statute until that time. *Ib.*
  25. The last clause of the 78th section of the act of congress, approved July 20, 1868, entitled "an act imposing taxes on distilled spirits and tobacco" (15 Stat., 159), contains no exception so incorporated in the body of the enactment that it must be negatived in an indictment founded on the clause. *The United States v. Insand*, 581
  26. An action on the case, begun in a state court, to recover damages for alleged slanderous words spoken by a United States collector of customs, while in the discharge of his official duty and explanatory of it, can be properly removed to the United States circuit court under the provisions of the "force act," approved March 2, 1833. *Buttner v. Miller*, 620
- See CONFISCATION, 12. FORFEITURE. PATENTS, 18. REMOVAL OF CAUSES, 1, 2.

### STOCKHOLDERS.

1. A stockholder in a business corporation cannot sue in equity for relief against an injury done or threatened to the corporation in which he is a stockholder without an averment that the corporation or its officers are derelict in their duty. *Morgan v. The Railroad Company and others*, 15
2. The ownership of stock does not give the stockholder any legal estate in the property of the corporation. *Ib.*
3. When a person subscribes stock, and his subscription is accepted, it is not a mere power in the bank, but its right, to call in the money, and it is the right of the stockholder to pay it; he is not obliged to wait until a call is made. *Marsh et al. v. Burroughs et al.*, 468
4. The fact, that holders of unpaid stock may have severally redeemed their share of the bills of the bank, does not release them from liability for the amount due on their stock subscriptions. *Ib.*

See BANKRUPTCY, 31. CORPORATION, 2. INDIVIDUAL LIABILITY.

STOPPAGE IN TRANSITU. See VENDOR, 2.

SUBROGATION. See LIENS, 1.

### SUCCESSION.

1. When a person takes possession of the property of a succession as executor, and not as heir or universal legatee, the property is first subject to the payment of the debts and legacies of the succession. *Labitut v. Prewett*, 144
2. A creditor of a succession who permits the heir to take unconditional control of an estate, without causing it to be administered, loses the right to pursue the property of the succession as distinct from that of the heir. *Ib.*

3. The remedies of legatees by a personal action against the heir, or by separation of patrimony, have no application when the heir as heir is not in possession of the estate. *Ib.*
4. The possession of an executor as executor under the appointment of the probate court, even when the executor is also heir or universal legatee, relieves the creditors and legatees of the succession from the necessity of resorting to such proceedings to protect their rights. *Ib.*
5. In order to vest the property of a succession in a universal legatee, so as to make him the debtor of the legatees and creditors of the succession, there must be some deliberate act on his part showing a purpose to take possession as universal legatee. *Ib.*

See LEGACY AND LEGATEE.

SUSPENSION. See BANKRUPTCY, 26.

### TAXATION.

1. The power of taxation belongs to the legislative department of the government. The judicial department has no general jurisdiction over the subject. *Heine v. The Levee Commissioners*, 246
2. An incorporated company whose business is to make gain by compressing cotton, is not required to pay a tax on its dividends by sec. 120, of the act of June 30, 1864 (18 Stat., 283). *Cotton Press Co. v. The Collector*, 296

See APPEAL, 6. EQUITY, 1, 4, 5, 7. MANDAMUS. MUNICIPAL CORPORATIONS. STATUTES CONSTRUED, 1.

TEXAS. See CONSTITUTIONAL LAW, 17, 18, 19. LIMITATIONS, 6, 7. RECORD OF DEEDS. STATUTES CONSTRUED, 18. VENDOR'S LIEN, 1, 2.

THIRTEENTH AMENDMENT. See CONSTITUTIONAL LAW, 15.

TRADER. See BANKRUPTCY, 22, 23, 26.

TREASON. See CONSTITUTIONAL LAW, 18.

### TRIAL BY JURY.

- If a claimant of land or property, seized on land, contests the material facts alleged in the libel of information, the issue is to be tried by a jury. *The Confiscation Cases*, 321

See CONFISCATION, 7.

### TRUST

1. The rule that trust property may be followed into whosoever hands it comes, with notice of the trust, does not apply to a case where an officer of a bank, being a member of a partnership, without due security, lends to his firm money of the bank, which becomes mingled with the other property of the partnership. *Cass, Receiver, v. Beauregard et al.*, 125
2. Although it is generally true that partnership creditors are to be preferred in the distribution of the property of the partnership, and may

follow it, if necessary, when one of the partners attempts to appropriate it to the payment of his individual debts; yet a mere simple contract creditor cannot maintain a suit for this purpose unless the partnership has in some manner gone into liquidation, or its property has been subjected to a trust for payment of debts — as where an assignment has been made in fact or in law. *Ib.*

8. Unpaid subscriptions to the capital stock of a company are corporate property constituting a trust fund which can be reached by creditors in a court of equity. *Marsh et al. v. Burroughs et al.*, 463

See EQUITY, 15, 16.

### TRUSTEE.

1. Where a party is in possession of lands, claiming under an adverse but defective title, without any fraud either of himself or his grantors, he cannot be held to be the trustee of the party holding the true title, nor if he has sold the lands, made to account for the proceeds of the sale to the true owner. *Gaines v. Lizardi*, 56
2. A mortgagee with power to sell is, in Georgia, a trustee for the mortgagor, his heirs, etc., and as such is accountable in equity, and this although the power may not be regarded as collateral, but coupled with an interest. *Lockett v. Hill et al.*, 552

See BANKRUPTCY, 23, 24. EQUITY, 10, 11, 13. POWERS, 7.

UTILITY. See PATENTS, 20, 21, 22.

VENDI. See WRIT.

### VENDOR.

1. A person who has sold goods and delivered them to a common carrier to be conveyed to the vendee, cannot maintain an action against the common carrier for their loss. *Blum, Frank & Co. v. The Caddo*, 64
2. In such a case the right of stoppage *in transitu* in the vendor does not affect the right of property in the vendee. *Ib.*
3. A vendor in making a contract of affreightment with a common carrier acts as the agent of the vendee, although the vendee may be a stranger to the carrier. *Ib.*

See VENDOR'S LIEN.

### VENDOR'S LIEN.

1. In Texas, a vendor's lien is not superior to or different from the ordinary lien of a mortgagee holding a mortgage given for the purchase money of the property mortgaged. *King v. The Young Men's Association*, 886
2. In Texas, the reservation of a vendor's lien in the deed of conveyance is equivalent to a mortgage taken for the purchase money contemporaneously with the deed. The purchaser has the equity of redemption precisely as if he had received a deed and given a mortgage for the purchase money, and he has the right to redeem. *Ib.*
3. If the purchaser has sold the land to a third person, and the deed has been duly recorded or made known to the original vendor holding a vendor's lien, the holder cannot turn such third person out of possession or extinguish his rights without legal process. *Ib.*

See LIENS.

**VOTING.** See CONSTITUTIONAL LAW, 16.

### WARRANTY.

**A.**, in Boston, was in correspondence with **B.**, in New Orleans, in reference to the chartering of a ship to **B.** to carry freights from New Orleans to Europe, and represented that the ship would sail from Boston for New Orleans on a day certain. *Held*, that the representation amounted to a warranty that the ship should sail on that day. The ship did not sail for two days after the time fixed; therefore, **B.** was not bound. *Deshon v. Foodick & Co.*, 286

### WILL.

1. Under the law of Louisiana the probate of a will is not conclusive against parties in possession of property which is sought to be recovered from them by virtue of it, unless they were parties litigant in the probate proceedings. *Fuentes v. Gaines*, 112
2. When the validity of a will is brought in question incidentally on question of title to property, it is open for investigation in any court in which the title may be litigated, whether a state court or a court of the United States. *Ib.*

See PRACTICE IN EQUITY, 6.

**WITNESS.** See CONSTITUTIONAL LAW, 24, 25. PRACTICE IN EQUITY, 63, 65, 66, 68.

### WRIT.

1. When a writ of *venditioni exponas*, issued from the circuit court, ran in the name of the president of the United States, bore *teste* of the chief justice of the United States, was under the seal of the court, but was not signed by the clerk, but by the deputy clerk in his own name, neither the writ nor the proceedings under it are void. *Grinnold v. Connolly*, 193
2. The defect in the writ could only be taken advantage of in a direct, and not in a collateral proceeding. *Ib.*

See PRACTICE AT LAW, 6.

















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